Supreme Court, U.S.
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No. 01 -

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Whether the Sixth Amendment right to effective assistance of counsel requires a defense attorney to "unearth" and present "all relevant mitigating information . . . for consideration at the capital sentencing phase."

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01 -

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, App. A at 1-21, is reported at 280 F.3d 1247 (9th Cir. 2002). The order of the District Court granting habeas corpus relief from respondent Caro's death sentence, App. B at 22-39, is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on February 19, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On the evening of August 20, 1980, respondent Fernando Caro [hereafter Caro] shot 15-year-old Mark Hatcher in the face as Mark and Mary Booher, his 15-year-old cousin, rode their bicycles in an orchard near Mark's home in rural Fresno County, California. Caro then fled in a pickup truck with Mary and the bicycles. Mary's body was found a few miles away in an orange grove on August 25. She had been shot in the head. The bicycles were abandoned in an irrigation canal.

While fleeing with Mary after killing Mark, Caro struck another car but failed to stop. The owner of the car and his friend gave chase and Caro eventually pulled over. After allowing the men to approach as he begged them not to hurt him, Caro suddenly displayed his gun and shot the men. Both survived, but one was left functionally blind in one eye.

Caro subsequently hid his truck and altered his facial appearance. The weapon used in the crimes belonged to his girlfriend.

Caro was represented at trial by the Fresno County Public Defender's Office.[1/] Counsel had Caro examined by at least four mental health experts. No expert found evidence of organic brain defect or suggested that further tests be conducted. EEG

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1. The case was tried in Santa Clara County on a change of venue.

examinations of Caro were normal. One expert observed that Caro's mental processes were efficient and effectively manifested and later testified that Caro was highly motivated and cooperative during the psychological testing. Caro's intellectual ability was significantly above average.

Counsel also submitted blood samples drawn from Caro when he was arrested to a laboratory, requesting that they be tested for the presence of various pesticides manufactured at a plant where Caro was employed at the time of the murders and his arrest five days later. The test results were negative for any of the substances.

At trial Caro's guilt defense consisted primarily of exposing discrepancies in the prosecution's case and attacking the sufficiency of the evidence on various counts.[2/] The jury convicted Caro of two counts of first degree murder, kidnapping, and two counts of assault with intent to commit murder. They also found true a multiple murder special circumstance, thus making Caro eligible for the death penalty.

The penalty phase of Caro's trial was heard, at his request, by a separate jury. In addition to the guilt phase testimony, the prosecution presented evidence of two prior uncharged murders,[3/] a prior kidnapping conviction stemming from a

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2. Counsel decided not to raise any guilt phase mental defense after one of the experts who had been retained specifically to assist with the guilt phase found, based on his interviews with Caro, no mental disorders that could establish a defense.

3. The jury was instructed that it must unanimously find beyond a reasonable doubt that Caro had committed the uncharged murders before the evidence could be considered as aggravation. In their verdict forms the jurors reported that they did not unanimously find Caro guilty of either murder and presumably followed the instruction not to consider those crimes in determining the appropriate penalty. The California

forcible kidnap and rape, and two attempts to escape from jail. The prior rape victim testified in the penalty phase.

Caro "introduced extensive background and character evidence" in mitigation. *People v. Caro*, 46 Cal.3d 1035, 1052, 251 Cal.Rptr. 757, 767, 761 P.2d 680, 690 (1988). Among the 17 witnesses called by defense counsel were Caro's parents, a brother, childhood and other friends, his high school coach, his ex-wife, his girlfriend, a job supervisor, and a vocational instructor from the state prison where Caro was incarcerated on the earlier kidnapping conviction. The defense also introduced a detailed history of Caro's life through a licensed clinical social worker and testimony from a clinical psychologist who had interviewed and tested Caro. The jury returned a sentence of death. Judgment was pronounced on January 5, 1982.

Caro's convictions and death sentence were affirmed by the California Supreme Court, which also considered two petitions for state habeas corpus relief. In his second state petition, filed in June 1992, Caro presented declarations from new experts who concluded, in part, that he might suffer from organic brain damage which might be tied to exposure to neurotoxic pesticides. The conclusions were based on examinations of Caro made ten to twelve years after the murders and without any expert expressly documenting an organic brain defect. These experts did not undertake to explain the relationship, if any, between such toxic exposure and the kidnapping, murders, and attempted murders for which Caro was convicted. Indeed, conspicuous by its absence was any reference in the expert declarations to Caro's crimes. Caro alleged that trial counsel was ineffective for failing to uncover and present evidence pertaining to neurotoxin exposure as mitigation. The claims

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Supreme Court observed that the unanimity instruction was not required by state law, thus providing Caro greater protection in the penalty phase than that to which he was entitled. *People v. Caro*, 46 Cal.3d 1035, 1057, 251 Cal.Rptr. 757, 771, 761 P.2d 680, 693 (1988).

were denied on the merits by the state supreme court without an evidentiary hearing in September 1993.

Caro then filed a federal habeas corpus petition in November 1993, again alleging *inter alia*, trial counsel was ineffective for not discovering and presenting as mitigation evidence that he allegedly suffered brain damage from neurotoxin exposure. The District Court denied an evidentiary hearing, granted the State's motion for summary judgment, and denied the petition.

On appeal the Ninth Circuit unanimously denied several claims relating to the guilt determination but held, in a 2-1 decision, that Caro was entitled to an evidentiary hearing on his assertion of ineffective assistance of counsel at the penalty phase. *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied* 527 U.S. 1049 (1999) [*Caro I*]; App. C at 40-63. Finding that trial counsel failed to consult the correct experts and thus failed to present "every piece of relevant evidence in mitigation," 165 F.3d at 1228; App. C at 48, the majority remanded to the district court for an evidentiary hearing "to determine whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable." *Id.*; App. C at 50.

The evidentiary hearing consisted of videotape testimony from three experts. Dr. Pincus, a neurologist, concluded that Caro had frontal lobe damage when the doctor examined him and presumed he suffered from such damage 20 years earlier when Caro committed the murders. Experts failed to uncover such damage at the time of trial because they used the wrong tests. Dr. Pincus did concede that he had no expertise in the effects of neurotoxin exposure and could not say whether pesticides could have caused any brain deficiencies.

Dr. Bear, a neuropsychiatrist, agreed that Caro had frontal lobe brain damage, which he attributed in part to pesticide exposure and head injury. The doctor admitted there was no agreement on what part of the brain is damaged by various

pesticides, no evidence such exposure can cause frontal lobe damage, and no agreement on how much exposure to neurotoxins can lead to aggressive behavior. While dismissing the absence of brain damage in the reports of trial experts, Dr. Bear did concede that attributing homicidal behavior to pesticide exposure was not "common currency" in 1980.

A toxicologist, Dr. Ecobichon, never met Caro and could say only from a review of records that Caro was exposed to various neurotoxic substances which had the potential to cause damage. He testified, as did Dr. Bear, that reports suggesting some link between pesticide exposure and aggressive behavior were entirely anecdotal in 1981. The doctor also acknowledged that Caro did not exhibit any neurological problems from childhood through high school, nor did it appear he suffered academic or athletic deficits of the type that might be expected from some forms of pesticide poisoning.

The State did not present its own experts but demonstrated through cross-examination and exhibits that Caro had an above average IQ, had done well academically, and was an athlete in high school. Caro attended college, became a Marine officer, and qualified for training as a helicopter pilot. Tests conducted while he was in prison on the kidnapping conviction demonstrated that Caro had no organic brain damage. Until the tests conducted many years after trial no mental health expert had found evidence of a brain defect. The State also presented evidence of negative results from the blood tests for pesticides requested by trial counsel.[4/] The blood testing evidence had not been available to the district court or the Ninth Circuit in the

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4. In a declaration filed during the initial district court proceedings Dr. Ecobichon noted that blood samples indicated Caro had been exposed to a fungicide, an assertion found significant by the Ninth Circuit majority. App. A at 13. The court ignored, however, Dr. Ecobichon's subsequent testimony that fungicides have little toxicity.

earlier proceedings.[5]

The district court concluded that it was "not empowered to conduct a Strickland analysis based on the evidence adduced at the hearing. Rather, the Ninth Circuit applied such an analysis and concluded that the attorney's performance was deficient, if, in fact, there is evidence that [Caro] suffered brain damage as a result of his exposure to toxic chemicals and his personal background." App. B at 38. The court then determined that Caro had suffered brain damage and granted relief from the death sentence pursuant to its understanding of the circuit court mandate. App. B at 38-39. It did not evaluate trial counsel's performance in light of the newly disclosed blood testing evidence.

On the State's appeal the Ninth Circuit, again by a 2-1 vote, affirmed the order granting relief. Citing its own prior decisions in this and other capital cases the court held that trial counsel had "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) [*Caro II*]; App. A at 11. By not informing the trial experts about Caro's exposure to pesticides and toxic chemicals, and by not selecting the correct experts, counsel's performance was deficient. App. A at 12. Although counsel did have Caro's blood tested they should have known the negative results "would not have told the whole story" and were still obligated to ask the correct questions about Caro's history

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5. In addition, the evidentiary hearing record established that at the time of Caro's trial a defense based on exposure to pesticides had not been presented in any criminal case. Since then, only one defendant had attempted, albeit unsuccessfully, to mount such a defense. *See Commonwealth v. Garabedian*, 399 Mass. 304, 503 N.E.2d 1290 (1987) (defendant convicted of first degree murder and sentenced to life without possibility of parole despite mental defense premised on exposure to pesticides supported in part by testimony of Dr. Bear).

of exposure to pesticides to the proper expert. App. A at 13. In addition counsel was obligated to present expert testimony explaining the impact of child abuse on Caro's brain. App. A at 12. The majority concluded that "'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'" App. A at 13, brackets in original. Trial counsel's failure to "'"present[] and explain[] the significance of all the available [mitigating] evidence,"'" App. A at 10, brackets in original, resulted in a constitutionally deficient penalty phase investigation. App. A at 14-15.

Turning to prejudice the majority determined that it was "incumbent" upon them to declare the brain damage found by the district court "relevant mitigating information" which "should have been explained to and considered by the sentencing jury." Because trial counsel did not present that testimony its omission "renders Caro's death sentence unreliable." App. A at 16. The majority was not dissuaded from its conclusion by the strength of the aggravating evidence, App. A at 16, and criticized the trial mitigation as consisting "primarily of lay background and character evidence." The expert testimony at trial was insufficient because it "did not shed light on [Caro's] brain damage" and "did not reduce his moral culpability for his own lack of control over his emotions." App. A at 16-17. The failure to provide the jury with expert testimony "explaining the effects that Caro's *physiological* defects would have on his behavior" was prejudicial. App. A at 17, emphasis in original. Because the majority believed Caro's "mental defect might have caused him to suddenly lash out uncontrollably" the night he murdered the teenage cousins and attempted to kill two other people, it held the penalty verdict unreliable. App. A at 18.

The dissenting judge found the majority "was trying the case, instead of the jury that heard it twenty years ago." App. A at 19. In light of the efforts counsel did take to investigate mitigation, the lack of information other than anecdotal dealing with the effects of pesticide exposure on the brain, and the

inconsistency of the new opinion evidence about brain damage with Caro's actual history and behavior, the majority's conclusion violated this Court's precedents with respect to claims of ineffective counsel. App. A at 20. Although the majority's holding "purported to be that Caro's lawyer rendered ineffective assistance of counsel, it is more consistent with the proposition that if anyone can come up with anything that might have bolstered whatever case the defense had, during the decades following imposition of a death penalty, then the defendant is entitled to a new penalty trial." App. A at 21.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). A state prisoner claiming violation of this right must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "It is past question," *Williams v. Taylor*, 529 U.S. 362, 391 (2000), that *Strickland* sets forth the rules by which any claim of ineffective assistance by trial counsel must be judged. It is equally clear the same standards apply to both the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 686-687 ("For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.").[6/] "As a general matter, a defendant alleging a Sixth Amendment violation must

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6. As in Florida the penalty phase of a California capital trial is heard by a jury which renders a verdict on the appropriate sentence. But the California jury verdict is not, as in Florida, a mere recommendation; the California penalty jury is the sentencing authority within the meaning of the Eighth Amendment.

demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 122 S.Ct. 1237, 1240 (2002), slip op. at 3, *citing Strickland*.

As explained in *Mickens*, 122 S.Ct. at 1241; slip op. at 3-4, the Court has established limited exceptions to the requirement of an "individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." One may arise where trial counsel actively represented conflicting interests, *id.*, a circumstance not at issue in this case. Otherwise a defendant may be entitled to a presumption of prejudicial effect "where counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 1241; slip op. at 3. The Court explained in *United States v. Cronic*, 466 U.S. 648, 659 (1984), that other than a complete absence of counsel a denial of the Sixth Amendment right may occur "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." The Court recently heard argument on the extent to which, if at all, counsel's actions in the penalty phase of a capital case can result in a constructive denial of representation, thus eliminating the need to demonstrate prejudice. *Bell v. Cone*, No. 01-400, *cert. granted* 122 S.Ct. 663, 151 L.Ed.2d 578 (2001) (argued March 25, 2002). This case presents issues similar to those underlying the Court's grant of certiorari in *Cone*, although the Ninth Circuit has gone further than did the Sixth Circuit by establishing an explicit rule applicable to all cases.

The Ninth Circuit granted habeas corpus relief from Caro's death sentence based on its determination that the posttrial opinions of experts demonstrated an inadequate investigation by trial counsel, because the attorneys had not consulted the right experts or provided the experts they did consult unsolicited information deemed significant by the new experts and the circuit court. App. A at 11-12; *see also Caro I*, 165 F.3d at 1226-1227; App. C at 45-46. Prejudice was deemed to have resulted because the jury "was not afforded the benefit" of the

newly developed expert testimony. App. A at 17.

The effect, as explained by Judge Kleinfeld's dissent, is to require reversal of a death sentence whenever any new or additional information is uncovered after the trial. App. A at 21. Specifically, the Ninth Circuit has established explicit, mandatory, penalty phase investigation responsibilities to "unearth" all potential mitigating evidence; trial counsel must satisfy this duty or be found deficient per se. The Ninth Circuit has further established what is in effect a per se rule of prejudice whenever potential mitigating evidence is uncovered after trial.[7] By eviscerating the *Strickland* standard the circuit court created new rules in violation of *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit has thus established both performance and prejudice tests that are fundamentally at odds with *Strickland* and yet will govern all future Ninth Circuit capital cases unless this Court grants certiorari.[8]

A. Trial Counsel's Duties

Because a "wide range of reasonable professional conduct" will satisfy the *Strickland* standard, 466 U.S. at 689, the Court

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7. In an opinion filed one month after *Caro* Judge Kleinfeld expressly observed that the court had created a per se rule of reversal whenever trial counsel had not introduced specific, newly developed evidence at the penalty phase. *See Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (Kleinfeld, J., dissenting).

8. Not surprisingly, over a six-week period from February 1, 2002, to March 18, 2002, the Ninth Circuit reversed the death sentence in two other California cases for ineffective assistance of counsel, *see Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002), and remanded a fourth for an evidentiary hearing on such a claim. *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

has "consistently declined to impose mechanical rules on counsel . . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The relevant question is whether trial counsel's decisions were reasonable. *Id.*

In *Caro I* the circuit court concluded that trial counsel in a capital case have a duty to consult specific experts in preparation for the penalty phase. Despite having hired four mental health experts, trial counsel were deemed deficient because none of the experts were neurologists or toxicologists. 165 F.3d at 1226; App. C at 45-46. The court based this holding on the fact federal habeas counsel had later found experts who were willing to opine that Caro suffered brain damage from exposure to toxic pesticides. The court necessarily assumed that trial counsel must have been deficient in not uncovering the same opinions nearly 20 years earlier. The decision completely shifted the focus from the reasonableness of what counsel actually did at the time of trial to what they allegedly should have done based on theories and evidence developed many years later.

The district court, in its order following the evidentiary hearing, clearly understood that the circuit court had created a presumption of deficient performance based solely on Caro's ability to develop any new potential mitigation. Although faced with evidence that trial counsel had, in fact, been aware of Caro's exposure to pesticides and had explored the issue by having his blood tested for residue from pesticides manufactured at the plant where Caro was employed,[9] the

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9. Caro was arrested five days after the murders and the blood samples were drawn from him at that time. The blood test results were not provided to the State until after the remand for an evidentiary hearing in *Caro I*; they were not in the record before the district court when it originally denied relief or before the Ninth Circuit when it issued its first opinion. Declarations of trial counsel prepared by Caro for the habeas corpus proceedings did not mention the blood samples, let alone

district court declared that it was "not empowered to conduct a Strickland analysis based on the evidence adduced at the hearing. Rather, the Ninth Circuit applied such an analysis and concluded that the attorney's performance was deficient, if, in fact, there is evidence that [Caro] suffered brain damage as a result of his exposure to toxic chemicals and his personal background." App. B at 38. This approach—one based not on what was done but solely on what was developed later—is utterly unfaithful to the reasonableness standard mandated by this Court.

On appeal the Ninth Circuit did nothing to discredit the district court's analysis or conclusion. Rather, it asserted that "'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'" App. A at 15, bracket in original, *citing Caro I*.[10/] This remarkable departure

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identify counsel's reasons for having them tested or reveal the contents of any discussion about the results with defense experts. By the time the results had been made available to respondent the decision in *Caro I* had already foreclosed any discovery or testimony from counsel on those issues by limiting the remand to whether Caro in fact suffered brain damage, the circuit court having already decided that counsel's investigation was deficient.

10. The court actually misquoted its earlier opinion. In *Caro I* the circuit court explained it is "imperative" that relevant mitigation be uncovered. 165 F.3d at 1227; App. C at 46. With elimination of "imperative" and inclusion of the bracketed "must" the court subtly modified an observation about the importance of penalty phase investigation into a mandatory duty which was violated by the subsequent development of additional mitigation. Its conversion of "a suggestion into a straightjacket" is wholly inconsistent with this Court's standards for evaluating counsel claims. *Smith v. Robbins*, 528 U.S. 259, 273 (2000).

from the reasonableness standard of *Strickland* cannot be dismissed as a careless peripheral reference in the majority opinion. Rather, the court characterized the newly-announced duty to "unearth" all available mitigating evidence as a holding, App. A at 15, thereby binding future Ninth Circuit panels which might be confronted with similar issues. *See, e.g., Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1994).

The court dismissed the blood testing as inadequate because a "reasonably competent attorney would have known that a blood test would not have told the whole story . . . ." App. A at 13. The only trial investigation deemed adequate was one that would have uncovered the same evidence disclosed by any subsequent investigation. In the Ninth Circuit's view, the multiple mental health experts consulted by counsel and numerous lay witnesses interviewed did not satisfy the performance prong of *Strickland* because, as the dissenting judge explained, habeas counsel were able to find more.[11/]

The requirement that trial counsel must find "all" mitigation to avoid being held deficient, as well as the "affirmative duty" to provide information to mental health

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11. The requirement that trial counsel must consult multiple mental health experts in order to locate the "right one" is not only at odds with this Court's *Strickland* standards, it arguably imposes a duty on state courts inconsistent with *Ake v. Oklahoma*, 470 U.S. 68 (1985) as well. While *Ake* granted indigent defendants access to a psychiatric expert, it did not guarantee an expert of the defendant's choice or a particular substantive result. *See, e.g., Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998). Given the Ninth Circuit decision in this case, a state trial court which denies a defendant's request for funds to hire multiple experts runs the risk of creating ineffective assistance by failing to provide counsel with the "right" expert. We emphasize that in this case Caro's counsel hired *four* mental health experts, all at public expense.

experts whether requested or not, place upon trial counsel explicit duties which are inconsistent with this Court's refusal to establish "bright-line" rules of performance. *Roe v. Flores-Ortega*, 528 U.S. at 480.[12]

Moreover, as is made clear in *Caro I*, 165 F.3d at 1226-1227; App. C at 44 - 46, the Ninth Circuit applies different performance standards to counsel in the guilt as opposed to the penalty phase of a trial and did so in this case. *See also Silva v. Woodford*, 279 F.3d 825, 843 (9th Cir. 2002); *Wallace v. Stewart*, 184 F.3d 1112, 1116-1117 (9th Cir. 1999), *cert. denied* 528 U.S. 1105 (2000).[13] As noted above this Court determined in *Strickland* that the same test applies to claims of ineffective assistance in both the guilt and penalty phases of a capital case. The higher performance standard and per se deficiency rule imposed in this case by the Ninth Circuit are indefensible under this Court's precedent and violates *Teague*.

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12. The imposition of these added burdens on trial counsel is also inconsistent with the prevailing understanding of *Strickland*'s teaching. *See, e.g., Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir.), *cert. denied* 506 U.S. 958 (1992) (counsel is not obligated to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders"); *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir.), *cert. denied* 516 U.S. 849 (1995) (same); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) (counsel is not obligated to track down every record that might affect expert diagnosis).

13. In a recent non-capital memorandum decision the Ninth Circuit expressly stated that its rejection of ineffective assistance of counsel claims "would probably be different" if the same claims related to the penalty phase of a capital trial. *Easley v. Clarke*, No. 00-16205 (9th Cir. February 21, 2002).

B. Requirement of Prejudice

The *"Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 519 U.S. at 391. Reversal is justified only if the petitioner carries his burden of proving there is a "reasonable probability" the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Court explained in *Williams* that when assessing the prejudice component of *Strickland* a court must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Id.* at 397-398. The Ninth Circuit acknowledged *Williams*, App. A at 15, but then applied its own per se reversal standard.

Noting Caro's personal background and the district court's finding that he had suffered brain damage from exposure to pesticides, the circuit court held it "incumbent" upon them "to find that this fact was relevant mitigating information and should have been explained to and considered by the sentencing jury. The omission of this evidence renders Caro's death sentence unreliable." App. A at 16. The mitigation from trial was dismissed on the ground that it "consisted primarily of lay background and character evidence," while the expert testimony presented by defense counsel was deemed to "shed [no] light on [Caro's] brain damage." App. A at 16 - 17. Because the jury did not have the "benefit of expert testimony" on the newly developed theory of brain damage and it possible effects on his behavior, Caro was denied effective assistance of counsel. App. A at 17 - 18.

In reaching this conclusion the court refused to analyze the evidence in aggravation. That evidence included Caro's purposeful stalking of his young victims, his behavior luring the assault victims into a false sense of security before shooting them, his attempts to conceal his truck and alter his appearance

after the murders, his prior kidnapping and rape of a young woman, and his multiple escape attempts. As noted, the court also gave no consideration to the 17 mitigation witnesses presented to the penalty jury. The trial evidence detailed Caro's difficult life history, including admissions from his parents that he was beaten as a child, despite which he had done well in school, attended college, and qualified as a Marine officer and pilot. The court also disregarded testimony from the new experts admitting the ways in which Caro's history and behavior failed to demonstrate that he was unable to control his behavior.

The Ninth Circuit concluded that irrespective of what the jury actually heard, absent the new expert evidence the penalty determination was not reliable. The circuit court thus supplanted the reasonable probability test set forth in *Strickland* and the Court's subsequent counsel cases with a new rule of per se reversal whenever additional mitigation is developed in collateral proceedings.

Given the relative ease with which habeas corpus counsel are able to create some new evidence, the Ninth Circuit rule makes reversal of the death sentence for ineffective assistance of counsel a virtual certainty in every case. The decision's inconsistency with this Court's precedent and conflict with other circuits warrant further review.

CONCLUSION

For the above reasons certiorari should be granted.

Dated: April 15, 2002

Respectfully submitted,

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DRG:pl

(2) Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO EROS CARO,
Petitioner-Appellee,

v.

JEANNE WOODFORD, Warden,
Respondent-Appellant.

No. 00-99013

Argued and Submitted
September 12, 2001 - Pasadena, California
Filed Feb. 19, 2002.

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Appeal from the United States District Court for the Northern District of California; James Ware, District Judge, Presiding. D.C. No. CV-93-4159-JW.

Before: PREGERSON, FERGUSON, and KLEINFELD, Circuit Judges.

FERGUSON, Circuit Judge.

A little explanation can go a long way. In this case, it might

have made the difference between life and death. But, because trial counsel for Fernando Eros Caro failed to investigate and present evidence of the impact that exposure to neurotoxicants and child abuse had on his brain, the penalty phase jury was deprived of this critical explanation in determining Caro's culpability for his crime.

This is the second time that this case has come before this panel's consideration. Previously, we held that counsel's nonstrategic failure to investigate Caro's brain damage, despite the known risk of neurotoxicants, constituted deficient performance under *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and that a showing of brain damage would demonstrate prejudice to establish his ineffective assistance of counsel claim. We remanded to the District Court to hold an evidentiary hearing to determine whether Caro, in fact, sustained brain damage as a result of his exposure to neurotoxicants and his personal background. The District Court found that Caro had established the existence of brain damage and, therefore, granted his writ of habeas corpus, vacated his death sentence, and ordered a resentencing hearing. The State appeals the Court's decision, and we now affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. CARO'S PERSONAL BACKGROUND

Fernando Eros Caro, the son of poor farm laborers residing in Brawley, California, spent his childhood working and playing in pesticide-soaked fields. The house in which he was raised was surrounded by agricultural fields and did not protect the family from the crop dusters that overflew those fields. The water, which his family used to bathe and cook and clean, was contaminated by pesticides.

Caro's exposure to toxic chemicals continued into

adulthood. During high school, he worked as a "flagger" for a crop-dusting company, indicating for the planes where to spray the pesticides onto the fields. He later worked as a maintenance worker at FMC Chemical Corporation ("FMC"), a manufacturer of toxic pesticides. At the plant, Caro responded to chemical spills, repaired the ventilation system, and maintained the mixing and heating equipment. He was regularly exposed to organophosphates, solvents, organochlorines, and carbamates, and he was poisoned by a number of toxic chemicals at the plant.

In addition, Caro has suffered serious physical abuse and head injuries. Caro's family has a multi-generational history of physical abuse, alcoholism, and neglect. Both parents beat Caro throughout his childhood, hitting him with closed fists, sticks, belts, work boots, and tools. His father kicked him with his work boots, struck his head with tools, and once broke his nose. His mother frequently hit him as an infant until he would stop crying. Caro also sustained several head injuries as a child: he was born with a three inch lump on his head due to the use of forceps during his difficult delivery; a water cooler fell on his head at the age of three; and he was hit by a car later that year.

B. PROCEDURAL HISTORY

On October 16, 1981, Caro was convicted for the murders of Mary Booher and Mark Hatcher, teenage cousins who disappeared while on a bicycle ride and were killed by a closerange gunshot to the head. Caro was also convicted of the assaults of Rick Donner and Jack Lucchesi, both of whom survived multiple gun shots inflicted on the same night as the murders.

On December 10, 1981, a second jury returned a verdict of death. The California Supreme Court affirmed. *People v. Caro,* 46 Cal.3d 1035, 251 Cal.Rptr. 757, 761 P.2d 680, 684 (1988).

After exhausting his state remedies, Caro filed a 28 U.S.C. § 2254 habeas petition in the United States District Court for the Northern District of California. The District Court denied Caro's request for an evidentiary hearing on his ineffective assistance of counsel claim, granted summary judgment for the State, and dismissed his habeas petition. On appeal, we found that Caro's counsel had failed to investigate and present evidence of brain damage during the penalty phase of the trial and remanded for an evidentiary hearing to determine whether Caro had suffered brain damage as a result of his chronic and acute exposure to neurotoxicants and his personal background. *Caro v. Calderon,* 165 F.3d 1223, 1228 (9th Cir.), *cert. denied,* 527 U.S. 1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999).

On remand, the District Court concluded: "The record before the Court irrefutably establishes that Petitioner suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background." *Caro v. Woodford,* No. C-93-4159-JW, Slip Op. at 16 (N.D.Cal. Aug. 7, 2000). Accordingly, it granted Caro's writ of habeas corpus as to the penalty phase of his trial. This timely appeal followed.

C. THE EVIDENTIARY HEARING

At the evidentiary hearing, Caro presented the testimony of Dr. Jonathan Pincus, a neurologist; Dr. David Bear, a neurophsychiatrist; and Donald Ecobichon, Ph.D, a toxicologist. Each of these expert witnesses testified that, at the time of his trial, he would have found Caro to suffer from brain damage due to his exposure to neurotoxicants, his personal history, or some combination thereof.

The State presented no witnesses at the hearing, relying instead on the cross- examination of Caro's experts. The State attempted to discredit the experts' conclusions that Caro

suffered from brain damage at the time of his trial, pointing out his high marks in school, satisfactory performance in the Marines, negative blood results for pesticides, reasonably high IQ, rationality of actions in covering up the murders, and normal psychiatric and neurological evaluations taken both before and after his trial. Yet, each of the experts testified that none of these facts was inconsistent with a finding of brain damage, especially frontal brain damage. Moreover, Dr. Pincus concluded that it is "highly likely" that the brain damage existed at the time of Caro's trial, based on both a lack of "significant" subsequent injuries and the fact that mixed dominance is indicative of childhood brain damage.

The State also attempted to prove that, at the time of Caro's trial, the medical community did not have the data nor the methods necessary to ascertain whether Caro had suffered brain damage due to his exposure to neurotoxicants and his personal background. However, each of the experts averred that the literature and data available then would have led him to the same conclusion at the time of Caro's trial.

Following the presentation of the evidence, the District Court ruled that the record "*irrefutably* establishes that Petitioner suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background." *Caro,* Slip Op. at 16 (emphasis added). It reasoned that "three prominent, well-respected witnesses presented by Petitioner universally opined that Petitioner suffers from frontal lobe brain damage caused by head injury, exposure to toxic pesticides and the combination of both factors. Respondent presented no witnesses or evidence to the contrary." *Id.*

II. DISCUSSION

On appeal, we resolve two issues. First, we hold that the District Court's finding of brain damage resulting from Caro's

exposure to neurotoxicants and personal background was not clearly erroneous. Second, we affirm the District Court's order granting relief on the basis that Caro has satisfied the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A. STANDARD OF REVIEW

The District Court's decision to grant the habeas corpus petition is reviewed de novo. *Paradis v. Arave,* 240 F.3d 1169, 1175 (9th Cir.2001). We review the District Court's factual findings for clear error. *Zichko v. Idaho,* 247 F.3d 1015, 1019 (9th Cir.2001). We must give considerable deference to the District Court's credibility determinations. *Anderson v. Calderon,* 232 F.3d 1053, 1094 (9th Cir.2000).

Whether the facts found by the District Court suffice to establish a claim of ineffective assistance of counsel is a question that we review de novo. *Id.* at 1084. "We may affirm on any ground supported by the record, even if it differs from the rationale of the district court." *Paradis,* 240 F.3d at 1175-76.

B. DISTRICT COURT FINDING OF BRAIN DAMAGE

We must first determine whether the District Court's factual finding that Caro suffered brain damage as a result of his exposure to neurotoxicants and his personal background was clearly erroneous. As the testimony of all the experts supported this conclusion, this finding was clearly not in error.

A full review of the testimony confirms that each of the experts testified that Caro suffered from brain damage caused by his exposure to neurotoxicants, his personal background, or some combination thereof. First, Dr. Pincus's conclusion that

Caro suffered from organic frontal brain damage followed a clinical assessment, which entailed twenty-five tests and a review of Caro's history.

Dr. Pincus found five indications of abnormality in the frontal lobe of Caro's brain.[1] These included: (1) "mixed dominance" (preference for eye and foot opposite to that of hand preference), (2) a "suck" reflex (abnormal reflex if found in adult), (3) a "snout" reflex (abnormal reflex if found in adult), (4) paratonia (inability to relax limbs), and (5) apraxia (frontal lobe or subcortical dysfunction). Dr. Pincus also found significant, for his diagnosis, Caro's history of pica;[2] head injuries; abuse by his mother and father; poisoning by Clorox; and epileptic-type seizure, which he had as an adult.

Second, Dr. Bear concluded that Caro suffered from both structural and functional brain damage based on: his chronic and acute exposure to cholinesterase inhibitors;[3] his exhibition of many of the autonomic symptoms of such exposure;[4] indicators

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1. Three or more abnormalities are considered to be a reliable indication of brain damage.

2. Pica is a symptom of a neurological or psychiatric disorder, which is usually only found in children and is manifested by the ingestion of non-nutritive substances, such as large quantities of dirt.

3. Dr. Bear defined "cholinesterase inhibitors" broadly as consisting of two chemical groups engineered to poison the enzyme acetylcholinesterase, and comprising organophosphates and carbamates. These chemicals were originally developed for use as nerve gas in the late 19th Century and during the World Wars, but were later used as pesticides.

4. Caro's autonomic symptoms of cholinesterase intoxication included: myosis of the eye, nausea, diarrhea,

of depression, including suicide threats; memory loss and other disassociative events; his mother's anemia; poverty-stricken childhood; history of physical, sexual, and emotional abuse; and childhood injuries. He also opined that Caro suffered from a genetic abnormality, reflected in his family's history of alcoholism and depression, which interacted with his exposure to neurointoxicants to increase the risk of brain dysfunction.

Finally, Dr. Ecobichon concluded that Caro suffers "persistent CNS [central nervous system] and peripheral damage," due to acute and chronic exposure to neurotoxicants. He cited Caro's early exposure as a child of farm workers, his work as a flagger, and his work at FMC. Dr. Ecobichon also observed that Caro was "the worst case I have ever seen of multiple exposures almost a lifetime, until his incarceration, of exposures to pesticides, from in utero right through infancy to adulthood." He concluded that this exposure would "cause transient and permanent neurological, psychiatric, and behavioral damage."[5/]

On cross-examination, the experts did not agree that Caro's reasonably high IQ or satisfactory performance in the Marines contradicted a finding of brain damage, explaining that frontal brain damage may hinder judgment and cause aggressiveness

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frequent and forced urination, constant thirst, and muscle twitching.

5. Dr. Ecobichon testified that acute exposure to certain pesticides, such as organophospates, affects the central nervous system and causes not only physiological reactions, but also depression, mental confusion, schizophrenic reactions, and temper outbursts. Moreover, exposure to several types of pesticides multiplies the effects by inhibiting those enzymes in the body that metabolize the chemical and causing much more severe effects.

without necessarily diminishing one's intelligence. For example, Dr. Pincus testified that damage to one's frontal lobes may not affect other brain functions controlled by the back of the brain, such as motor skills, sensory perception, memory, and speech. One's IQ may be unaffected because it only relates to functions controlled by the posterior parts of the brain.

The District Court's acceptance of the unanimous opinion of the experts that Caro suffers from brain damage is not clearly erroneous, considering that he was poisoned by extremely toxic pesticides (some of which are now illegal), suffered multiple head injuries, and exhibited many of the symptoms described by the doctors as consistent with both harmful exposure and resulting brain damage.

Moreover, we must afford the District Court considerable deference in its determination that the witnesses were qualified to draw such conclusions and that their testimony was credible. *Anderson,* 232 F.3d at 1094. Deference aside, we agree with the District Court that each witness was sufficiently qualified to testify to Caro's brain damage. Dr. Pincus is an expert in neurology and serves as Professor and Chairman Emeritus of Georgetown University Medical Center's Department of Neurology. Dr. Bear is a neuropsychiatrist and Professor of Psychiatry at the University of Massachusetts Medical Center, as well as Director of Psychiatry for Eastern Maine Health Care. Much of his research has focused on the neurological causes of aggression and effects of neurotoxic exposure on the brain. Finally, Dr. Ecobichon is an expert in the field of pesticide toxicology whose knowledge of the effects of pesticides spans four decades.

On the other hand, the State failed to present *any* affirmative evidence, which either controverted the experts' conclusions or discredited their testimony. As such, the District Court's finding was not clearly erroneous. Accordingly, we

affirm the District Court's findings adduced from the evidentiary hearing.

C. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. *Strickland,* 466 U.S. at 685, 104 S.Ct. 2052. In determining whether a defendant was afforded his constitutionally- guaranteed effective assistance of counsel, we must analyze all the facts under *Strickland* 's two-prong test. This requires us to determine, first, whether "counsel's performance was deficient" and, second, whether the "deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. 2052.

1. Deficient Performance

The issue before us is whether Caro's trial counsel rendered ineffective assistance when he failed to investigate and present mitigating evidence of Caro's brain damage. Counsel may be found ineffective if Caro demonstrates that counsel's performance was objectively unreasonable. *Id.* at 688, 104 S.Ct. 2052. What was reasonable under the circumstances must be evaluated as of the time that the legal services were rendered so as to minimize the distortions of hindsight. *Bonin v. Calderon,* 59 F.3d 815, 833 (9th Cir.1995) (quoting *Campbell v. Wood,* 18 F.3d 662, 673 (9th Cir.1994) (en banc)).

We recently held that "[t]o perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.' " *Mayfield v. Woodford,* 270 F.3d 915, 927 (9th Cir.2001) (en banc) (quoting *Williams v. Taylor,* 529 U.S. 362, 393, 399, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

In *Caro,* we held that counsel's failure to investigate and provide appropriate experts with the information necessary to evaluate Caro's neurological system for mitigation constituted deficient performance under *Strickland. Caro,* 165 F.3d at 1226-27. This is consistent with the recent Supreme Court decision, *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the Court held that counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitutes deficient performance. *Id.* at 396, 120 S.Ct. 1495.

Caro is also consistent with this Court's precedent. We have repeatedly held that counsel may render ineffective assistance if he "is on notice that his client may be mentally impaired," yet fails "to investigate his client's mental condition as a mitigating factor in a penalty phase hearing...." *Hendricks v. Calderon,* 70 F.3d 1032, 1043 (9th Cir.1995); *accord Smith v. Stewart,* 241 F.3d 1191, 1199 (9th Cir.2001); *Smith v. Stewart,* 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied,* 531 U.S. 952, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000).

We have also held that counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health. *Wallace v. Stewart,* 184 F.3d 1112, 1116 (9th Cir.1999), *cert. denied,* 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000) (counsel has "a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request[.]"); *Clabourne v. Lewis,* 64 F.3d 1373, 1385 (9th Cir.1995). This duty to provide the appropriate experts with pertinent information about the defendant is key to developing an effective penalty phase presentation. *Bean v. Calderon,* 163 F.3d 1073, 1079-80 (9th Cir.1998), *cert. denied,* 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999).

In this case, counsel was aware of Caro's extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined Caro of those facts that were known to him. Further, despite counsel's awareness of these facts, he failed to seek out an expert to assess the damage done by this poisoning of Caro's brain. As we emphasized in our earlier opinion, "All counsel had to do was ask the question 'What did all that extraordinary exposure to chemicals do to his brain?' And then, in order to find the answer, he merely had to address the question to either a neurologist or a toxicologist." *Caro,* 165 F.3d at 1228. Such evidence would have provided powerful mitigating evidence at the penalty phase of Caro's trial.

Similarly, counsel failed to present testimony at the penalty phase of trial explaining the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child. We recently found deficient performance when counsel failed to present mitigating evidence of the defendant's troubled childhood and substance abuse. *Ainsworth v. Woodford,* 268 F.3d 868, 875 (9th Cir.2001). We opined that "the introduction of expert testimony would also have been important" to explain the effects that "serious physical and psychological abuse and neglect as a child" had on the defendant. *Id.* at 876 (internal quotation marks omitted). Similarly, Caro's counsel failed to present testimony which would have imparted upon the jury the detrimental impact that child abuse had on Caro's brain.

Moreover, counsel's failure to investigate or present evidence of Caro's brain damage was not strategic. This is not, thus, a case in which we may excuse counsel's failure to reasonably investigate or present evidence as a matter of tactical decisionmaking. *See, e.g., Bonin,* 59 F.3d at 834. Caro's trial counsel has filed a declaration conceding that he had *no* strategic reason for failing to investigate the effects that Caro's

exposure to neurotoxicants and his personal background had on his brain. Accordingly, he has failed to adequately justify his reasons for not conducting a reasonable investigation and, therefore, rendered deficient performance.

The State urges us not to find deficient performance for two reasons: first, it argues that counsel did conduct a reasonable investigation into Caro's possible brain damage. In the alternative, it argues that counsel's failure to investigate was not unreasonable due to the paucity of literature regarding the link between exposure and brain damage at the time of Caro's trial.

First, it contends that counsel did, in fact, launch an investigation into the chemical poisoning of Caro's brain by ordering a blood test but desisted after the test results were negative. Thus, the State argues, counsel fulfilled his duty to conduct a reasonable investigation into Caro's possible brain damage.

This contention is unpersuasive. First and most notably, the blood test taken by counsel *did* indicate that Caro had been exposed to a fungicide. Dr. Ecobichon has asserted that this fact alone should have put counsel on notice that further investigation was necessary. Nonetheless, assuming *arguendo* that the only blood tests ordered by counsel came back negative for presence of pesticides, Caro's extraordinary history of exposure should have prompted counsel to ask an expert about the risks of Caro's chronic exposure. A reasonably competent attorney would have known that a blood test would not have told the whole story; it was capable only of showing that certain chemicals indicative of pesticide exposure were in Caro's bloodstream at that moment in time. It would certainly not reveal the entirety of the cumulative effect that a lifetime of exposure to neurotoxicants and abuse would have on Caro's neurological system.

The State also contends that we cannot find deficient performance because the medical community was not yet aware of the effects of neurotoxicants on one's neurological system at the time of Caro's trial. If true, this fact would preclude a finding of deficient performance because the reasonableness of counsel's performance must be evaluated from his perspective at the time of the trial, not in hindsight. *Strickland,* 466 U.S. at 689-90, 104 S.Ct. 2052.

However, the State is mistaken--the dangers of pesticides were known in 1980- 1981. Each of the expert witnesses testified at the evidentiary hearing that the literature and data then available would have led him to conclude that Caro suffered brain damage as a result of his exposure to neurotoxicants, childhood injuries and abuse, or a combination thereof.

Dr. Ecobichon testified that, as early as the 1950's, studies had specifically linked exposure to pesticides with aggressive behavior and that "any competent toxicologist or neurologist who was interested in this area" would have been aware of data sufficient to diagnose Caro's brain damage. Dr. Bear testified that the link between cholinesterase inhibitors and violence became known as early as 1960, and between cholinesterase inhibitors and brain damage in the early 1970's. By the early 1970's, well-known studies had documented long-term effects of exposure. He also testified that, by 1980 or 1981, a psychiatrist should have known about the studies linking behavioral disorders to exposure to cholinesterase inhibitors. And, although only some of the tests used to test Caro were available at the time of his trial, Dr. Pincus testified that the "most important tool"--the gathering of the patient's history from his family and friends--existed then. Because counsel failed either to conduct a reasonable investigation into the effects of Caro's exposure to neurotoxicants and his personal background on his brain or to provide a strategic or tactical

justification therefor, we hold that his performance was constitutionally deficient.

2. Prejudice

A finding of deficient performance does not end our inquiry, however. We must also find that Caro was prejudiced by his attorney's incompetence. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. To show prejudice under *Strickland,* the defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

In a challenge to a death sentence, the question presented is "whether there is a reasonable probability that, absent the errors, the sentencer-- including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S.Ct. 2052. This inquiry thus compels us to couple the omitted evidence with the mitigating evidence presented at trial and reweigh it against the aggravating evidence to determine whether the omitted evidence "might well have influenced the jury's appraisal of ... [the defendant's] moral culpability." *Williams,* 529 U.S. at 397-98, 120 S.Ct. 1495.

We have held that "all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase." *Caro,* 165 F.3d at 1227. This is critical because: "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors give the jury broad latitude to consider amorphous human factors, to weigh the worth of one's life against his culpability." *Id.* (quoting *Hendricks,* 70

F.3d at 1044); *cf. Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 1920, 150 L.Ed.2d 9 (2001) ("[T]he jury [must] be able to consider and *give effect to* [a defendant's mitigating] evidence in imposing sentence" so "that we can be sure that the jury has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence.") (emphasis in original) (internal quotations omitted).

The District Court concluded that Caro suffered brain damage as a result of his acute and chronic exposure to neurotoxicants and his personal background. It is incumbent upon us to find that this fact was relevant mitigating information and should have been explained to and considered by the sentencing jury. The omission of this evidence renders Caro's death sentence unreliable.

The State contends that Caro was not prejudiced by this omission because the aggravating evidence before the jury was "substantial." The factors in aggravation included evidence that Caro stalked Hatcher before killing him, lured Donner and Lucchesi to come near him so that he could shoot them at close range, attempted an alibi, had previously kidnaped and sexually assaulted other victims, and had made two escape attempts.

The State's argument does not dissuade us from our conclusion. We recently held that "[e]ven in the face of this strong aggravating evidence," a death sentence is rendered unreliable "if we cannot conclude with confidence that the jury would unanimously have sentenced ... [the defendant] to death if ... [counsel] had presented and explained all of the available mitigating evidence." *Mayfield,* 270 F.3d at 929 (citing *Williams,* 529 U.S. at 368- 69, 399, 120 S.Ct. 1495).

It is significant, in considering the impact of the omitted evidence on the reliability of Caro's sentence, that the evidence

presented by the defense as mitigation consisted primarily of lay background and character evidence. The only expert testimony presented relating to Caro's mental health did not shed light on his brain damage.

The first of the two experts presented at trial was Dr. Errol Leifer, a psychologist, who was unfamiliar with defendant's background and who, consequently, did not provide much in the way of compelling mitigation evidence. He surmised that Caro "was of superior intelligence but that he seemed periodically to lapse into a lower level of functioning in which he appeared to lose his grip on reality and to indulge in hostile and aggressive thoughts." This did not explain Caro's behavior and tended, rather, to paint him as a violent psychopath.

Defense also presented the testimony of Lynn Woodward, a social worker, who testified that Caro had suffered abuse, and as a result, "had a lot of suppressed rage and ... that his bottled emotions could conceivably manifest themselves in periods of explosive, uncontrolled aggression." She also opined that Caro probably killed the two teenagers because his girlfriend had recently left him and he became enraged "at seeing what appeared to be a happy couple sharing something he felt he could never have." While this testimony might have shed some compassionate light on Caro's frame of mind, it certainly did not reduce his moral culpability for his own lack of control over his emotions.

Furthermore, the evidence that was omitted is compelling. The jury was not afforded the benefit of expert testimony explaining the effects that Caro's *physiological* defects would have on his behavior, such as causing him to have "impulse discontrol" and irrational aggressiveness. By explaining that his behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced. *Cf. Williams,* 529 U.S. at 398, 120 S.Ct.

1495 (finding prejudice when the omitted evidence suggested that defendant's "violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation.").

This omission becomes even more compelling in light of the fact that "the evidence [of premeditation] was not particularly strong" in the prosecution's case against Caro. *Caro,* 251 Cal.Rptr. 757, 761 P.2d at 689. This fact is significant because a "conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland,* 466 U.S. at 696, 104 S.Ct. 2052.

More than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system. 4 WILLIAM BLACKSTONE, COMMENTARIES *24-*25 ("[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.... [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses ....") (*quoted in Penry v. Lynaugh,* 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)). We query whether the jury would have wavered on sentencing Caro to death if it had known that, on the night of August 20, 1980, a mental defect might have caused him to suddenly lash out uncontrollably. We will never know for certain, but fortunately we need not resort to telepathy. It is sufficient that we are not confident the jury's selection of sentences would have been the same.

Because it has been established that Caro suffers from brain damage, the delicate balance between his moral culpability and the value of his life would certainly teeter toward life. Therefore, we find that counsel's errors prejudiced Caro by rendering the results of his penalty phase trial unreliable.

III. CONCLUSION

Considering the testimony presented at the evidentiary hearing, the District Court was not clearly erroneous in finding that Caro suffered from brain damage as a result of his exposure to neurotoxicants and his personal background. Furthermore, considering all the facts of the case, Caro is entitled to relief on his ineffective assistance of counsel claim. For the foregoing reasons, we affirm the District Court's grant of relief.

AFFIRMED AND REMANDED.

KLEINFELD, Circuit Judge, dissenting.

I dissent. The district court did not err in this case. But we did.

The opinion the majority issued the last time this case was heard on appeal[1/] limited the evidentiary hearing to this question: "whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background." That was all the district court was mandated to do, and that is what it did. The state's attorney called no witnesses on the brain damage issue, the defendant called several, and the district court went with the evidence before it.

The problem in the case came at the earlier stage, when we formulated that outlandish mandate. It was as though the majority in this habeas case was trying the case, instead of the jury that heard it twenty years ago. The question before us was not (or at least should not have been) whether Caro was brain damaged. The only legitimate question before us was whether Caro's lawyer rendered ineffective assistance of counsel.

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1. *Caro v. Calderon,* 165 F.3d 1223 (9th Cir.1999).

The majority, in its first opinion, failed to approach that question seriously in light of the controlling precedents. I explained why in my previous dissent.[2] Basically, the majority said in that opinion that Caro's lawyer fell beneath the minimal standards of criminal defense attorneys by not discovering and proving that pesticides damaged Caro's brain when he was a child. I explained in my dissent that (1) Caro's lawyer consulted two psychiatrists, a clinical psychologist, and a licensed clinical social worker, to get whatever mitigating evidence they could come up with regarding Caro's mental or emotional condition; (2) the lawyer presented all the beneficial evidence they could come up with; (3) it wasn't much, and these experts did not suggest to the lawyer that there was anyone or anything else that would generate more useful evidence; (4) the research on how pesticides cause brain damage was in large part published in the decades following Caro's trial, so it was a physical impossibility for an expert witness to have relied on it;[3] (5) it probably wouldn't have made any difference to Caro's death penalty even if his lawyer had somehow proved, before it was generally accepted in the medical literature, that Caro's childhood pesticide damage had caused brain damage, in view of his competent intellectual and social functioning in college and in the Marines, and his relentlessness and recidivism in his monstrous rapes and murders. As I also explained in my previous dissent, the majority decision did not follow this court's precedents and the mandate of the Supreme Court.[4]

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2. *Id.* at 1228-34 (Kleinfeld, J., dissenting).

3. The majority opinion states that at the evidentiary hearing the experts testified that research was available during the early eighties that should have put Caro's attorney on notice. In doing so, it ignores testimony indicating that most of the important research on the subject did not materialize until after Caro's trial, and what was available was largely anecdotal.

4. *See Strickland v. Washington,* 466 U.S. 668, 104

Though the majority's decision purported to be that Caro's lawyer rendered ineffective assistance of counsel, it is more consistent with the proposition that if anyone can come up with anything that might have bolstered whatever case the defense had, during the decades following imposition of a death penalty, then the defendant is entitled to a new penalty trial. It is especially striking that at the core of the habeas case is testimony by one of the psychiatrists that Caro's lawyer consulted that if he had it to do over again, knowing what he knows now, his view would have been different.[5] That may establish that he performed below the required standard of competence (or it may not--medical science advanced over the decades since the imposition of Caro's death penalty), but it does not even bear on the question whether *defense counsel* fell below the required standard of competence. This latter question, about defense counsel, is the only one we have authority to answer.

Generally the doctrine of law of the case requires us to stick with a decision we have made. There is an exception to that rule, however, where our previous decision was "clearly erroneous and would work a manifest injustice."[6] That exception applies. I dissent.

S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Babbitt v. Calderon,* 151 F.3d 1170 (9th Cir.1998); *Coleman v. Calderon,* 150 F.3d 1105 (9th Cir.), *rev'd on other grounds,* 525 U.S. 141, 119 S.Ct. 500, 142 L.Ed.2d 521 (1998); *Williams v. Calderon,* 52 F.3d 1465 (9th Cir.1995), discussed at *Caro,* 165 F.3d at 1228-34.

5. *Caro,* 165 F.3d at 1226.

6. *Leslie Salt Co. v. United States,* 55 F.3d 1388, 1393 (9th Cir.1995); *see also United States v. Garcia,* 77 F.3d 274, 276 (9th Cir.1996) (applying the law of the case doctrine *sua sponte*).

Filed August 7, 2000
Richard W. Wieking, Clerk
U.S. District Court
No. Dist. of CA, San Jose

NOT FOR CITATION

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FERNANDO EROS CARO,
Petitioner,

v.

SUSAN WOODFORD, Acting Warden,
Respondent.

No. C-93-4159-JW

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS REGARDING PETITIONER'S PENALTY PHASE

I. INTRODUCTION

The Court conducted an evidentiary hearing in this action on June 21, 2000 pursuant to the remand of the Ninth Circuit in

Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999). In its opinion, the Circuit considered whether Petitioner Fernando Eros Caro ("Petitioner") was entitled to an evidentiary hearing regarding his habeas claim that his trial counsel rendered ineffective assistance by failing to investigate and present the combined effects of Petitioner's long-term exposure to neurotoxicants, as well as his neurological impairments and personal background, to the penalty phase jury. Based on the record before it, the Ninth Circuit held that Petitioner was entitled to an evidentiary hearing "to determine whether he suffered brain damage as a result of his exposure to neutrotoxicants and his personal background." Id. at 1228. The Circuit also determined that, if Petitioner was able to establish that he had indeed suffered brain damage as a result of his childhood injuries and long-term exposure to neurotoxicants, then "his counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable." Id. The Court then remanded the case back to this Court to conduct an evidentiary hearing.

Based on all of the evidence presented to the Court, including the deposition tapes and transcripts of Donald John Ecobichon, Ph.D.; Jonathan H. Pincus, M.D.; and David M. Bear, M.D., as well as the written and oral arguments of counsel, the Court finds that Petitioner has established that he "suffered brain damage as a result of his exposure to neurotoxicants and his personal background." Based on the Ninth Circuit's instructions in this case, the Court concludes that Petitioner's counsel's "failure to investigate renders the results of Caro's penalty phase trial unreliable". Id. Therefore, the Court grants Petitioner's petition for a writ of habeas corpus in this case and vacates the sentence of death rendered against Petitioner in the state court proceedings.

II. PROCEDURAL BACKGROUND

Petitioner was sentenced to death on January 5, 1982, following his conviction for the murders of two Fresno County teenagers.[7/] Petitioner's judgment and sentence were affirmed by the California Supreme Court on October6, 1988 and the United States Supreme Court denied certiorari on April 24, 1989. The state court denied a petition for a writ of habeas corpus on September 22, 1988. Petitioner filed a second petition for writ of habeas corpus in the California Supreme Court in June of 1992. That petition was denied on September 15, 1993.

In November of 1993, Petitioner filed a petition for writ of habeas corpus in this Court. That petition presented all of the issues that Petitioner had previously raised in his 1992 state habeas proceeding. Respondent filed a motion for summary judgment as to all of Petitioner's claims. Respondent argued that some of the claims were procedurally barred, while the remainder of the claims could be resolved by review of the sate court record. Due to the complexity of the case and the number of claims involved, the Court phased Respondent's summary judgment motion into two portions: procedural and substantive. On July 11, 1995, the Court issued an order denying Respondent's motion for summary judgment on the basis of procedural bar. The Court held that none of Petitioner's claims were procedurally barred and that all claims were properly before this Court.

The Court then conducted the substantive phase of Respondent's motion for summary judgment and determined whether Petitioner was entitled to an evidentiary hearing as to

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7. Although the murders occurred in Fresno County, Petitioner was tried and convicted in Santa Clara County on a change of venue.

21 of his 35 claims. With respect to the remaining 14 claims, Petitioner conceded that an evidentiary hearing was not warranted so the Court resolved such claims on the record and papers submitted. The Court then determined that Petitioner was not entitled to an evidentiary hearing as to any of the 21 claims he presented. Summary judgment in favor of Respondent was entered on August 19, 1996. Petitioner timely appealed the Court's order on September 19, 1996.

As noted above, the Ninth Circuit held that Petitioner was entitled to an evidentiary hearing with respect to his claims that his trial counsel afforded ineffective assistance by failing to investigate and present the combined effects of Petitioner's long-term exposure to neurotoxicants, neurological impairments and personal background at the penalty phase of his state court trial. In an amended opinion dated January 11, 1999, the Ninth Circuit held that, if the Court were to find that Petitioner established that he suffered brain damage as a result of these events, then his "counsel's failure to investigate will have rendered the results of Caro's penalty trial unreliable." Caro at 1228. In all other respects, the Ninth Circuit affirmed this Court's denial of Petitioner's petition for a writ of habeas corpus.

III. PETITIONER'S BACKGROUND

Petitioner was born on December 3, 1949 and was the oldest of eight children. (UF 17, 18.)[8/] His parents and grandparents were poor farm laborers who resided in the town of Brawley, located in rural Imperial County, California. (UF 18, 20.) His family is of both Mexican-American and Yaqui

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8. All references to "UF" are excerpted form the parties' Joint Prehearing Statement Regarding Discovery, Undisputed Facts, and Evidentiary Hearing Witnesses Statement filed on March 28, 2000.

Indian descent. (UF 19.) At the time of Petitioner's upbringing, the Imperial Valley was rigidly segregated in housing, employment, schooling and access to services. (UF 22.) Brawley was also geographically segregated by race by railroad tracks which divided the Latino community on the east side and the Anglo community on the west side. (UF 25.) Mexican Americans were discouraged from crossing over the tracks to the west side of town. (UF 26.)

Petitioner's family moved to Brawley and built a shack on an empty lot. (UF 28.) The shack had no running water or indoor plumbing. (UF 31.) Later, the family bought a house which had been condemned by the city and moved it to the outskirts of town. (UF 32.) The house was not insulated and had no access to sewage lines. (UF 34, 35.) It was surrounded by agricultural fields and adjoined large livestock pens. (UF 36.) The livestock attracted flies and Petitioner was charged with applying pesticide spray throughout the house multiple times per day to keep the flies away. (UF 39, 40.)

Schools in Brawley were racially segregated and Mexican American and African American students were subjected to verbal and physical abuse from Anglo students and teachers. (UF 42, 43, 44.) Teachers used belts, rulers and fists to hit students. (UF 45.) In particular, students, including Petitioner, were struck by teachers for speaking Spanish in school. (UF 45.)

Petitioner was raised in abject poverty. (UF 47.) His family often had no money for postage stamps and clothes. (UF 47, 48, 49.) Petitioner's clothes were made from flour sacks. (UF 50.) The family often went hungry and one of Petitioner's siblings died of dehydration during infancy. (UF 52, 53.)

From 1950 through 1968, Petitioner and his family migrated from the Imperial Valley to the San Joaquin and

Salinas Valleys to pick ripening crops. (UF 54, 55, 56.) Petitioner sat in the fields at the side of the road or slept in the tent until he was old enough to walk and pick crops. (UF 57, 60.) During harvesting season, the family ate mainly oatmeal and beans. (UF 59.) They used kerosene lamps for light and to cook their food. (UF 64.) Water from the irrigation canals was used for cooking and bathing. (UF 65.)

As a child, Petitioner exhibited pica, which is a sympton of neurological or psychiatric disorder. (UF 69.) Pica is the ingestion of non-nutritive substances such as large quantities of dirt. (UF 69.) Petitioner ingested toxic chemicals from eating pesticide sprayed dirt. (UF 69.) Petitioner and his family were exposed to on-going, unprotected contact with a range of neurotoxicants. (UF 70.) They could not afford, and were not given, any protective clothing. (UF 71.) Crops were often still wet with pesticides when the family entered the fields to harvest. (UF 72.) Petitioner frequently played in freshly sprayed fields of alfalfa as a child. (UF 75.) He experienced parathesis and numbness in his arms and legs at night. (UF 114.)

Petitioner comes from a family with a multi-generational history of serious physical abuse, alcoholism and neglect. (UF 76.) Petitioner witnessed his father beating his mother and was, himself, beaten by his father. (UF 78, 81.) Petitioner was kicked with his father's boot, beaten with a broomstick or belt, beat about the head with tools and had his nose broken by his father at age 12 or 13 years old. (UF 81, 82, 84.) Petitioner's father beat all of the children but singled out Petitioner for beatings of longer duration and more intensity. (UF 85.) Petitioner's mother also physically abused him and verbally humiliated and degraded him. (UF 87.) He was an irritable and colicky infant and was frequently hit by his mother since he would not stop crying. (UF 88. 90.) At the age of ten months old, Petitioner's grandmother took him away from his mother

due to the abuse his parents inflicted upon him. (UF 92.) However, the abuse continued once Petitioner was returned to his parents. (UF 93.)

Petitioner suffered traumatic injuries throughout his birth and childhood. He was born with the use of forceps, resulting in a 3 inch by 3 inch lump on his head. (UF 95.) At age three, Petitioner drank Clorox from a bottle and suffered a serious of convulsions which lasted four to six minutes. (UF 96.) He foamed at the mouth and turned blue. Id. At age five, Petitioner was hit in the leg by a car. (UF 97.) He fell to the ground and hit his head. Id. he was also hit in the head with a water cooler later that same year. (UF 98.) Petitioner also suffered measles with a high fever. (UF 99.)

By the age of eight or nine, Petitioner regularly complained that he was suffering from severe headaches. (UF 100.) These headaches lasted from childhood through high school, college, the Marine Corps and while Petitioner was employed at FMC. (UF 101, 102, 103, 104, 105.)

In 1968, Petitioner was employed as a flagger at Val-Air, a crop-dusting company in Brawley. (UF 124.) Petitioner's tasks included mixing the pesticides in drums, loading the plane with these chemicals, cleaning up the chemical mixing areas and flagging the plane. (UF 125.) Petitioner reported that he was often splashed with pesticides during the mixing and loading process. (UF 126.) He was also directly sprayed with pesticides in the course of flagging the pilot. (UF 131.) Petitioner did not wear protective clothing or equipment and had not access to a shower while he was employed at Val-Air. (UF 127, 132.) He attended school in the same clothes he wore to Val-Air. (UF 133.) Classmates commented on the smell of pesticides which emanated from Petitioner's clothing. (UF 134.) Petitioner's family also noted the smell of his clothes when he came home from school and could finally shower. (UF

135.)

In July of 1978, Petitioner was hired as a maintenance worker and watchman at FMC Chemical Corporation in Fresno. (UF. 138.) FMC-Fresno was a pesticide formulation plant. (UF 139.) In his work at FMC, Petitioner was regularly exposed to organophosphates, solvents, organochlorines and carbamates. (UF 159.) The protective clothing worn by Petitioner at FMC was found to be inadequate by occupational health inspectors. (UF 160.)

While employed at FMC, Petitioner was poisoned by Furidan, Parathion, Omite and Thiodan. (172, 173, 174, 175.) As a result of these poisonings, Petitioner suffered vomiting, stomach cramps, diarrhea, rashes, eye twitching, sweating, and seemed incoherent. Id. Petitioner was also exposed to Azodrin, BAAM, Carbaryl, Cygon, Sinox, DDT, Kelthane, Malathion, sulfur and other pesticides in the routine course of his work at FMC. (UF 178.) He was arrested while working at the FMC plant on August 25, 1980 for the murders of two teenagers, Mary Booher and Mark Hatcher.

IV. PETITIONER'S TRIAL

On the evening of August 20, 1980, Mary Mooher and Mark Hatcher, fifteen year-old cousins, left Hatcher's home for an after-dinner bike ride. About one half-hour later, Hatcher's mother and grandmother left the home and went to meet the teenagers on their way home from the bike ride. As the women walked, they heard a gunshot from the direction of the orchard behind the house and saw a pickup truck leaving the orchard. Hatcher had been shot in the face at close range. Booher was missing.

The teenagers' bikes were fond the next day in an irrigation canal about eight (8) miles from Hatcher's home. Booher's

body was discovered on August 25, 1980, in an orange grove a few miles away. Booher had been shot in the head and a later autopsy revealed that she had died within two hours of a meal.

On the evening of August 20, 1980, Rick Donner and Jack Lucchesi were stabbed in the parking lot of a bar at an intersection about two miles from the Hatcher slaying. A pickup truck approached the intersection, driving erratically. The truck entered the parking lot and Donner observed the driver looking down at the seat or floor of the cab. The truck cut across the lot and glanced against Donner's parked car, causing slight damage. The truck did not stop, so Donner and Lucchesi chased it in their own cars.

After about five minutes of chasing, the truck stopped and pulled over. Donner and Lucchesi pulled in behind the truck and got out of their cars. The driver got out of his truck and faced the men, with his left hand hidden inside the cab. Lucchesi walked towards the man, who put up his hand and said "don't hurt me" several times. Lucchesi said no one would hurt him and asked why he hadn't stopped in the parking lot when he hit the car. The man said he was afraid that he would get beat up if he stopped. A bicycle was lying in the bed of the truck.

Suddenly, the driver's expression changed and Lucchesi stepped back toward the road. The driver withdrew his left hand from the truck and fired a revolver at Lucchesi, hitting him above the right eye and knocking him to the pavement. he then fired two shots at Donner, hitting him in the thigh. He then walked over to Lucchesi and shot him again in the chest. Donner escaped through the orchard as the driver fired two more shots at him, both of which missed. Donner then heard the gun click empty and turned and saw the driver get back in his truck and drive away. Donner reached a home and summoned for help. Both men survived the shooting, although Lucchesi was left functionally blind in one eye.

Within a few days of the incident, Petitioner's supervisor saw a picture in the paper of the man described by Donner and Lucchesi. The supervisor called the police and told them that the description matched that of Petitioner and that Petitioner owned an orange Chevrolet side-step truck like the one described in the assaults. The supervisor told police that Petitioner had not driven that truck to work since the incident. Based on such information, the police arrested Petitioner at work on August 25, 1980. While Petitioner was being escorted to his locker to change his clothes, he broke free and ran, but was soon captured and taken into custody.

Petitioner waived his Miranda rights and denied being involved in either the Booher-Hatch murders or the Donner-Lucchesi assaults. Petitioner said he was home with his girlfriend, Cathy Lozano, on the night of August 20, 1980. He gave police permission to search his truck. In it, they found a gun owned by Lozano. Petitioner told the police that his truck had been damaged in an accident on August 15, 1980. Since the truck matched the description in the newspapers, he decided not to drive it and kept it in the garage. He denied that there had been a bicycle in the back of the truck on August 20, 1980.

The evidence presented at trial established that a bullet fragment removed from Hatcher's brain had been fired from Lozano's gun, as had a bullet recovered from the wall of the house to which Donner fled the night of the assault. Lozano testified that she had been away from August 18, 1980 until about midnight of August 20, 1980 and that she did not have her gun with her during that time. Lozano also testified that two or three hours before she returned home on August 20, she had had a conversation with Petitioner in which Petitioner told her that he had gotten into a hassle with some guys and had had to pull the gun.

In addition, the paint on Donner's car from the collision

matched the paint on Petitioner's truck, and tire tracks left near Booher's and Hatcher's bodies were consistent with Petitioner's truck's tires. Donner thought the license number on the truck was "30079N" or "30779N". Petitioner's truck license number was "30997N". Shoe prints near Booher's and Hatcher's bodies matched prints taken from Petitioner's garage, although no shoes were found in Petitioner's possession which could have made the prints.

At Petitioner's request, the trial court conducted separate guilt and penalty phases. At the penalty phase, the trial court permitted the government to introduce evidence regarding two prior uncharged murders implicating Petitioner, a prior kidnaping conviction and two escape attempts.

Petitioner did not testify at either phase. At the guilt phase, Petitioner focused on discrepancies inthe porosecution'scase and argued the absence of motive for either killing. At the penalty phase, he presented evidence casting doubt on his guilt as to the uncharged murders. He also introduced extensive character background, through testimony by his parents, brother, childhood friends, high school coach, brother-in-law, ex-wife, girlfriend, supervisor and a vocational instructor from the California Correctional Institution at Tehachapi where Petitioner served his prison term for the 1975 kidnaping. Petitioner also presented the testimony of a clinical psychologist and a licensed clinical social worker.

Petitioner contends that he has now, and had at the time of the crimes at issue in this case, organic brain damage. Petitioner contends that his constant exposure to dangerous neurotoxicants, combined with his extensive child abuse and cultural history of discrimination, rendered him incompetent to stand trial. Petitioner argues that none of this information was presented to the penalty phase jury.

V. DISCUSSION

As noted above, the Court was instructed by the Ninth Circuit to hold an evidentiary hearing in this case to determine whether Petitioner suffered brain damage as a result of his exposure to neurotoxicants. An evidentiary hearing was held by the Court on June 21, 2000. At the hearing, Petitioner presented the videotaped deposition testimony of Dr. Jonathan Pincus, Dr. Donald Ecobichon and Dr. David Bear. Respondent did not present any witnesses.

Dr. Jonathan H. Pincus is a neurologist and is presently Professor of Neurology and Chairman emeritus of the Department of Neurology at Georgetown University Medical Center. Dr. Pincus conducted a neurological examinationof Petitioner in 1994. He assessed the cranial nerves, motor, sensory, reflexes, cerebellum and mental status. Dr. Pincus performed 25 independent tests of Petitioner's frontal lobes. He explained that the frontal lobes of the brain are responsible for personality, judgment, insight, irritability, impulsivity, affability, the capacity to foresee the outcome of an action and to read other people and to modulate, alter, persist, exclude extraneous stimuli and concentrate on the matter at hand. When frontal lobe damage occurs, Dr. Pincus stated that people do things and commit acts which the frontal lobe normally prevents them from doing.

A finding of abnormality on three or more of these neurological tests has been proven to be a statistically significant, valid and reliable method for reaching a conclusion regarding brain damage. Petitioner had abnormal responses on five of the tests administered by Dr. Pincus. Petitioner exhibited "mixed dominance"; abnormal reflexes; "suck and snouth" reflexes; paratonia of the arms and legs; and, an inability to perform the three-step command test with either hand. Based on his neurological exam, Dr. Pincus opined that

Petitioner suffered from frontal lobe brain damage that resulted from head traumas, neurotoxic exposure, and their interaction.

Donald Ecobichon, Ph.D. is an expert in the field of toxicology and a prominent researcher on the role of pesticides as neurotoxicants. He is retired but currently consults in the area of pesticide use and safety. Dr. Ecobichon explained that there are three primary classes of pesticides in use throughout the world – organochlorines, organophosphates and carbamates. Organochlorines such as DDT act on the sensory nervous sytsem, causing a hyperexcitability to stimuli and triggering exaggerated reflexes, muscle tremor, muscle jerking, tremors, seizures, and convulsions. DDT was banned from use in the United States in 1973. (UF 122.) Organiophosphates and carbamates act similarly. They target the central and peripheral nervous systems, resulting in behavioral changes such as reduced levels of concentration, depression, mental confusion, slowing of performance, impairment of judgment, muscle tremors and twitching, irritability, temper outbursts, and hyperexcitability. Petitioner exhibited these behaviors. (UF 106, 114, 172, 173, 174, 175, 180.)

Dr. Ecobichon noted that Petitioner had been exposed to a significant number of different pesticides since the time of his birth. Many of these pesticides are now known to be the moxt toxic. Based on Petitioner's personal life history, Dr. Ecobichon opined that Petitioner suffered from brain damage as a result of his exposures to pesticides. He also stated that any toxicologist or neurologist would concur with his conclusion.

Finally, Dr. David Bear, a neuropsychiatrist and tenured professor of psychiatry at the University of Massachusetts Medical Center and Director of Psychiatry for Eastern Main Health Care, testified that the study of the relationship between neurotoxic exposure and brain damage has a very long history in the medical literature beginning in the 1880s. Dr. Bear

opined that Petitioner suffers from structural and functional brain damage that resulted, in part, from his pesticide exposures. Dr. Bear also concurred with Dr. Pincus on the reliability of the tests performed on Petitioner and the conclusions to be drawn from the abnormal results.

Respondent did not present any testimony at the evidentiary hearing, choosing instead to rely upon her cross-examination of Petitioner's experts. Respondent pointed out that Dr. Pincus has testified in about 36 criminal cases around the country, in all but one case as a witness for the defense or petitioner. He is opposed to the use of the death penalty for someone who is shown to have neurological deficiencies. Dr. Pincus thought it "highly likely" but "not a certainty" that Petitioner had frontal lobe damage at the time that he committed the murders in1980. (PRT 78, 132-33.)[9/] Nor could he state with certainty that Petitioner would have exhibited the same abnormal tests responses in 1980 as he did in 1994. (PRT 183-184.)

With respect to the testimony offered by Dr. Ecobichon, Respondent pointed out that Dr. Ecobichon is not a physician and has never met Petitioner nor reviewed any of the declarations of any other experts. (ERT 88-89.)[10/] Dr. Ecobichon noted that there were no studies as of 1981 which directly linked pesticide exposure to pathological neurlogical behavior. (ERT 105-106.) He also opined that poor judgment and unacceptable behavior cannot alone be attribtued to pesticide exposure. (ERT 177.)

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9. PRT refers to the Reporter's Transcript of Dr. Pincus' deposition testimony.

10. ERT refers to the Reporter's Transcript of Dr. Ecobichon's deposition testimony.

Dr. Ecobichon admitted that Petitioner achieved reasonably good grades in school and that there were no records suggesting that he suffered neurological problems as a child up through high school. (ERT 121-122; Exh. A.) Petitioner's participation in athletics and his grades did not suggest that his exposure to pesticides resulted in memory or cognitive difficulties. (ERT 130-131; Exh. D.)

Dr. Ecobichon was also not aware of any record that indicated that Petitioner had suffered exposure to any pesticide between June 1968 when he stopped working as a crop duster and July of 1978 when he tarted working at FMC. (ERT 131, 137-138, 141-142.) He also conceded that the tests conducted when Petitioner was in prison in 1976 concluded that his IQ was 118 and found no organic brain damage. (ERT, Exh. F.) However, Dr. Ecobichon testified that he did not know what tests were used in 1976 and that testing batteries focusing on pesticide exposure were not developed until the mid-1980s. (ERT 138-140.) With respect to the blood samples drawn from Petitioner on the day of his arrest, five days after the murders, Dr. Ecobichon testified that he would not use a blood level assay as being very indicative of anything. (ERT 166.) In addition, since the test found no pesticides above a detection limit of one nanogram, he would not expect to see any behavioral effects. (ERT 167.)

Finally, with respect to the testimony of Dr. Bear, Respondent pointed out that Dr. Bear conceded that "nobody could say one cause was definitely the cause" of Petitioner's brain damage. (BRT 94-95.)[11/] He also agreed that exposure to a toxic substance does not mean that the person will in fact be affected by it. (BRT 99.) Dr. Bear attributed no significance to the blood sample drawn from Petitioner in 1980 since he alleges

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11. BRT refers to the Reporter's Transcript of Dr. Bear's deposition testimony.

that the wrong tests were used to detect pesticides. (BRT 185-186; Exh. J.) He also found insignificant the EEG test conducted on Petitioner in 1981. (BRT 189, Exh. K.)

Respondent argues that the Court must assess whether Petitioner was denied effective assistance of counsel at his penalty phase trial as a result of the failure of his counsel to present expert testimony regarding Petitioner's exposure to toxic pesticides, pursuant to the requirements of Strickland v. Washington, 466 U.S. 668 (1984). A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth Amendment right to counsel, which guarantees not only assistance, but effective assistance of counsel. Id. at 686. First, petitioner must show that counsel's performance was deficient. Second, he must show that counsel's errors were so serious that he was deprived of a fair trial, a trial whose result is reliable. Id. at 688.

Respondent contends that the evidence shows that Petitioner's counsel ordered blood samples to be taken from Petitioner on the day of his arrest, which was just five days after the murders, to test for the presence of Omite, parathian, paraoxon and cygon. These tests produced negative results. (ERT, Exh. L; BRT, Exh. J.) Based upon this finding, Respondent argues it was reasonable for counsel to abandon this line of inquiry, especially in light of the fact that none of the medical experts had uncovered evidence of brain damage. Respondent also argues that Petitioner cannot establish prejudice as a result of his counsel's failure to present his exposure to toxic chemicals to the penalty phase jury.

Petitioner argues that the Court need not and, in fact, cannot engage in a Strickland analysis based upon the Ninth Circuit's remand in this case. The Circuit limited its remand to this Court solely for the purpose of conducting an evidentiary hearing regarding whether petitioner suffered brain damage as

a result of his exposure to toxic pesticides. No further inquiry or analysis is permitted by the remand.

In reviewing the Ninth Circuit's opinion, the Court notes that the panel applied the Strickland standard to the record before it and concluded that "[A] lawyer who knows of but does not inform his expert witnesses about these essential pieces of information going to the heart of the case for mitigation does not function as 'counsel' under the Sixth Amendment, let alone as a 'good lawyer'." Caro 165 F.3d at 1228. The Court continued, "Caro is therefore entitled to an evidentiary hearing to determine whether he suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate *will have rendered the results of Caro's penalty phase trial* unreliable." Id. at 1228. (Emphasis added.)

Based on this language, the Court finds that it is not empowered to conduct a Strickland analysis based on the evidence adduced at the hearing. Rather, the Ninth Circuit applied such an analysis and concluded that the attorney's performance was deficient, if, in fact, there is evidence that Petitioner suffered brain damage as a result of his exposure to toxic chemicals and his personal background. This Court's role is limited, then, to conducting an evidentiary hearing to determine whether Petitioner suffered brain damage as a result of his exposure to neurotoxicants and his personal background.

The record before the Court irrefutably establishes that Petitioner suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background. The three prominent, well-respected witnesses presented by Petitioner universally opined that Petitioner suffers from frontal lobe brain damage caused by head injury, exposure to toxic pesticides and the combination of both factors. Respondent presented no witnesses or evidence to the contrary. Therefore, the writ must

issue in this case.

VI. CONCLUSION

For the reasons set forth herein, the Court finds that Petitioner has established that he suffered brain damage as result of his exposure to neurotoxicants and his personal background. Based on the Ninth Circuit's holding that trial counsel's failure to present such evidence to the jury rendered the results of Petitioner's penalty phase trial unreliable, the Court grants Petitioner's petition for a writ of habeas corpus as to the penalty phase of Petitioner's state court trial.

DATE: August 7, 2000

JAMES WARE
United States District Judge

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO EROS CARO,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 96-99019.

Argued and Submitted March 5, 1998.
Decided Oct. 27, 1998.
Amended Jan. 11, 1999.

Joseph C. Spero, Keith Evans-Orville, Coblentz, Patch, Duffy & Bass, LLP, San Francisco, California, for the petitioner-appellant.

Dane R. Gillette, Senior Assistant Attorney General, San Francisco, California, for the respondent-appellee.

Appeal from the United States District Court for the Northern District of California; James Ware, District Judge, Presiding. D.C. No. CV-93-04159-JW.

Before: PREGERSON, FERGUSON and KLEINFELD, Circuit Judges.

FERGUSON, Circuit Judge:

Fernando Caro appeals the District Court's dismissal of his

writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] In this opinion, we consider whether Caro was entitled to an evidentiary hearing on his claim that counsel's failure to investigate the combined effects of Caro's extraordinary exposure to neurotoxicants, neurological impairments, and personal background constituted ineffective assistance of counsel at the penalty phase trial. We conclude that Caro is entitled to an evidentiary hearing and remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Caro was convicted on October 16, 1981, of two counts of first degree murder, the kidnapping of one of the victims, and two counts of assault with intent to commit murder. On December 10, 1981, a sentencing jury returned a verdict of death. On October 6, 1988, the California Supreme Court set aside one of the special circumstance findings as duplicative, but otherwise affirmed the judgment. *People v. Caro,* 46 Cal.3d 1035, 251 Cal.Rptr. 757, 761 P.2d 680 (1988). Caro subsequently filed two writs of habeas corpus with the California Supreme Court. The court denied both writs. Caro then filed a writ of habeas corpus in the United States District Court for the Northern District of California. The District Court denied Caro's request for an evidentiary hearing, granted summary judgment for the State, and dismissed the petition.

Caro is of Mexican-American and Yaqui Indian heritage. He was raised in a racially divided rural community in conditions of abject poverty. The oldest son of farm laborers, Caro spent most of his childhood living in a shack surrounded by livestock yards and agricultural fields. The house had no

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1. By a memorandum disposition filed this date we have concluded that petitioner is not entitled to habeas corpus relief on the guilt phase issues raised in his petition.

running water or indoor plumbing and, due to its proximity to the livestock yards, was filled with flies and other insects that "made the sky black." During the summer, Caro and his family joined the stream of migrant farm workers. The family slept in fields, open tents, or along the road, sometimes using empty crates as beds. Caro worked alongside the adults as soon as he was able to walk.

Caro's role as the oldest son of a traditional family meant that his parents' expectations of him were higher than those for his siblings. Declarations from his mother, sister, and other relatives all indicate that Caro was the most severely beaten of his brothers and sisters because he was the oldest. Both parents beat Caro severely throughout his childhood, hitting him with closed fists, sticks, belts, tools, and boards, and kicking him with work boots.

Caro suffered severe head injuries as a child. His mother reports that he was born with a three inch lump on his head due to the use of forceps during his difficult delivery. At the age of three, Caro was struck by a car and fell back and hit his head. A water cooler fell on his head that year as well.

Caro also suffered from acute and chronic exposure to neurotoxic chemicals throughout his life, some of which have been documented to cause otherwise inexplicable aggressive behavior. Caro's family used water laden with pesticides both at home and in the fields for drinking, bathing, and cleaning. His family used insecticide on a daily basis to fight the insect infestation at home. At the age of one and a half, Caro drank a bottle of Clorox and went into convulsions, turning blue and foaming at the mouth, for four to six minutes. Throughout his childhood, Caro worked and played in fields covered with pesticides. One day, while playing on a tank of ammonia, Caro peered into the tank and lost consciousness from the fumes.

During high school, Caro worked as a "flagger"--someone who stands in the fields to indicate to the crop duster where to dump his load of pesticides. Caro was denied the protective clothing his supervisors wore as they watched him mix and load the chemicals prior to dumping. Because he had no access to a shower or time to change clothes before school, Caro would spend all day in pesticide-drenched clothes. The pungent smell of the pesticides earned him the nickname "Stinky" among his classmates.

As an adult, Caro worked for the two years prior to his arrest as a maintenance worker at a corporation that produced toxic pesticides. One of Caro's primary tasks was to clean the air ventilation system and the mixing and heating equipment. Workers were not given protective respiratory devices. Rather, they were tethered with a rope to a waist belt so they could be pulled out of the system when they lost consciousness. Workers also cleaned contaminated equipment, holding pieces of equipment in vats of solvents with their hands. Plastic protective gloves regularly tore during this work. Caro volunteered to break down five or six transformers containing polychlorinated byphenyls ("PCBs"), formerly banned from use. Caro also formed part of the plant's Emergency Response Team, responding to at least three accidents during his employment. During one of these accidents, the cloud of Parathion that was released burned the paint off the walls.

STANDARD OF REVIEW

The District Court's denial of an evidentiary hearing is reviewed for an abuse of discretion. *Swan v. Peterson,* 6 F.3d 1373, 1384 (9th Cir.1993) (citing *Greyson v. Kellam,* 937 F.2d 1409, 1412 (9th Cir.1991)).

DISCUSSION

Caro is entitled[2/] to an evidentiary hearing if (1) he has alleged facts that, if proved, would entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *See Turner v. Marshall,* 63 F.3d 807, 815 (9th Cir.1995) (quoting *Tinsley v. Borg,* 895 F.2d 520, 530 (9th Cir.1990)); *see also Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963), *rev'd on other grounds by Keeney v. Tamayo-Reyes,* 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992); *Siripongs v. Calderon,* 35 F.3d 1308, 1314 (9th Cir.1994).

In order to demonstrate that his counsel was ineffective, Caro must show that his counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Effectiveness must be judged as of the time the legal services were rendered so as to minimize the distortions of hindsight. *Bonin,* 59 F.3d at 835. In addition, Caro must show that the deficient performance rendered the results of his trial unreliable or fundamentally unfair. *See Strickland,* 466 U.S. at 687, 104 S.Ct. 2052; *see also Lockhart v. Fretwell,* 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

Failure to investigate a defendant's organic brain damage or other mental impairments may constitute ineffective assistance of counsel. *See, e.g., Hendricks v. Calderon,* 70 F.3d 1032, 1043-44 (9th Cir.1995); *Evans v. Lewis,* 855 F.2d 631, 637-38 (9th Cir.1988). In addition, this Court has recognized

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2. The Anti-Terrorism and Effective Death Penalty Act's amendments to 28 U.S.C. § 2254 do not apply retroactively. *Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *see also Jeffries v. Wood,* 103 F.3d 827, 827 (9th Cir.1996) (en banc). We therefore apply pre-1996 law.

that the failure to present evidence necessary to bridge a cultural gap may constitute ineffective assistance of counsel. *Siripongs,* 35 F.3d at 1316. Counsel have a duty to make a reasonable investigation such that they are able to make informed decisions about how best to represent their clients. *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052; *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir.1994). "Thus, we have found counsel ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so." *Sanders,* 21 F.3d at 1456.

Caro has presented several declarations from experts stating that no evaluation of his mental capacities is complete without information concerning Caro's exposure to neurotoxicants as well as his personal background. Caro was examined by four experts prior to trial, including one medical doctor, a psychologist, and a psychiatrist. None of the experts indicated that Caro suffered from a mental impairment severe enough to constitute legal insanity or diminished capacity. Nevertheless, the medical doctor who examined Caro prior to trial has since declared that, had he known of Caro's extraordinary exposure to pesticides, the severe physical, emotional, and psychological abuse he suffered as a child, and his social and cultural history, he would have testified that Caro had a diminished mental capacity. In addition, the competence of the psychiatrist is subject to question, since he prompted a suicide attempt by telling Caro that he should have the right to take his own life. Finally, none of the experts were neurologists or toxicologists and none conducted the neurological testing needed to evaluate the effects that the pesticides and chemicals had on Caro's brain.

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the

conclusion of the expert. Counsel in this case was aware of Caro's extraordinary acute and chronic exposure to neurotoxicants, and yet he failed to consult either a neurologist or a toxicologist, experts on the effects of the chemical poisoning. In addition, he failed to provide those experts who did examine Caro with the information necessary to make an accurate evaluation of Caro's neurological system.

The conclusion of the dissent is based upon a misunderstanding of the difference in the mental and medical issues discussed in *Williams v. Calderon,* 52 F.3d 1465 (9th Cir.1995), and those presented here. In *Williams,* referring to the guilt phase of the trial, we stated that "no psychiatrist would have made a difference." *Id.* at 1470. We have set forth in our memorandum disposition which pertains only to the guilt phase of Caro's trial that the lack of medical evidence discussed in this opinion was not ground for granting the writ in the guilt phase.

However, this case is now about the sentencing phase of Caro's trial and the effect in that phase of Caro's chemically-induced neurological damage. It has been demonstrated that such poisoning causes inexplicable and aggressive behavior. No amount of disdain for the Yale Medical School can change the fact that the jury here was never presented with the most important evidence of mitigation--the chemical poisoning of Caro's brain. Furthermore, the dissent fails to understand the difference between chemical poisoning causing brain damage which results in aggressive behavior and the death of a brain cell caused by the lack of oxygen as the result of a stroke which does not cause aggressive behavior. As the dissent does not understand that difference, then it is clear that a jury must have such a difference explained by experts. It may be the difference between life and death.

It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.

"The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." *Hendricks,* 70 F.3d at 1044 (quoting *Deutscher v. Whitley,* 884 F.2d 1152, 1161 (9th Cir.1989), *vacated and remanded on other grounds,* 500 U.S. 901, 111 S.Ct. 1678, 114 L.Ed.2d 73 (1991)); *see also Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

The government argues that Caro suffered no prejudice during the sentencing phase because the jury was presented with extensive mitigating evidence, there was overwhelming evidence of Caro's guilt, and aggravating factors weighed against him. The sentencing jury was aware that Caro was beaten and suffered head injuries as a child. The jury also knew that Caro worked as a flagger in high school and at an agricultural chemical company as an adult. The jury did not, however, have the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior. Expert evidence is necessary on such issues when lay people are unable to make a reasoned judgment alone.

In addition, this Court has held that overwhelming evidence of guilt does not ameliorate the failure to present mitigating evidence at the penalty phase. *Hendricks,* 70 F.3d at 1044. "The determination of whether to impose a death sentence is not an ordinary legal determination which turns on the establishment of hard facts. The statutory factors [in California] give the jury broad latitude to consider amorphous human factors, to weigh the worth of one's life against his culpability." *Id.* The type of mitigating evidence omitted here is precisely the type most likely to affect a jury's evaluation of the punishment Caro should receive.

Babbitt v. Calderon, 151 F.3d 1170 (9th Cir.1998), is distinguished from this case. *Babbitt* is a case in which the defendant suffered from post traumatic stress disorder because

of his experiences in Vietnam. *Id.* at 1173. At trial, Babbitt presented testimony from two experts concerning his condition. *Id.* Also, at the habeas proceeding in district court, trial counsel stated that he had hired an experienced death penalty investigator who conducted a thorough investigation into Babbitt's history and found every piece of relevant evidence regarding Babbitt's background that could bear in mitigation. *Id.* at 1176. The court held that, with respect to both guilt and penalty phases, counsel's failure to pursue further evidence that was largely cumulative of the testimony given at the trial was not constitutionally deficient. *Id.* at 1174, 1176.

All that is entirely different from Caro's case. Caro's is not a case of stress caused by a stressful history; rather, it is a case of chemical poisoning of the brain causing aggressive behavior. Unlike Babbitt's case, not a single piece of evidence of Caro's condition was introduced at trial. Counsel, although aware of the acute and chronic exposure to neurotoxic chemicals, did nothing with regard to acquiring experts on the effects of chemical poisoning. In addition, counsel failed to provide those who did examine Caro with the information that he had. All counsel had to do was ask the question "What did all that extraordinary exposure to chemicals do to his brain?" And then, in order to find the answer, he merely had to address the question to either a neurologist or a toxicologist. Similarly, he could have asked the question to the experts he did retain who would have then told him that he needed to consult others.

This cases differs from *Babbitt* where "[t]here was no need for counsel to seek out [additional experts] independently." *Id.* at 1174. It is clear that, contrary to what the dissent believes, *Babbitt* and this case are not based "on materially similar facts," *see ante* at newly added dissent footnote 1, because every piece of relevant evidence in mitigation was not presented here at trial.

We also held in *Babbitt* that even if there was deficient performance of counsel that the defendant could not show prejudice. *Id.* at 1175-76. In Caro's case, on the issue of prejudice, the dissent does not state that the case for prejudice does not exist, only that it is "weak." *Ante,* at 1177 n. 2. It is submitted that "weak" prejudice is prejudice nonetheless, particularly when the jury was not presented with the single most important evidence of mitigation--chemical brain poisoning causing aggressive behavior.

Finally, with reference to footnote one in the revised dissent, robust dissent always has been universally recognized as an essential part of the judicial process as it requires judges to focus with particularity upon those matters in the case that divide them. The majority welcomes the intensity of the dissent in this case. However, it is difficult to believe that the dissent would base its test for determining constitutional Sixth Amendment competency of attorneys on its personal unsubstantiated belief in what "good lawyers" often do, rather than on what actually happened in this case.

It must be understood that Caro's brain injuries and poisoning are different from the facts of any other case that has been called to the court's attention. Caro suffered severe head injuries at birth and afterwards. As a child, he drank and bathed in water contaminated with poisons and then, in high school, worked in fields where he was drenched in pesticides. As an adult, he worked in vats filled with toxic pesticides without the benefit of any protective breathing devices. A lawyer who knows of but does not inform his expert witnesses about these essential pieces of information going to the heart of the case for mitigation does not function as "counsel" under the Sixth Amendment, let alone as a "good lawyer." Furthermore, a lawyer whose expert witness advises his client to commit suicide must engage in what the dissent pejoratively labels "witness shopping."

Despite Caro's efforts to obtain an evidentiary hearing on this issue, neither the district court nor the state courts have reliably found the facts relevant to this claim. Caro is therefore entitled to an evidentiary hearing to determine whether he suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable.

The judgment of the district court denying the petition for writ of habeas corpus as it pertains to the sentencing phase of the petition is remanded to the district court for an evidentiary hearing as set forth in this opinion.

REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Today's decision is in conflict with our decision in *Williams v. Calderon,* 52 F.3d 1465 (9th Cir.1995).[1] In

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1. All three of us on the panel missed *Babbitt v. Calderon,* 151 F.3d 1170 (9th Cir.1998). It came down as we were finishing our responses to each others' draft opinions in this case. The petition for rehearing has educated us about *Babbitt.* We now have a duty either to follow *Babbitt* or distinguish it.

I think we cannot distinguish it and must follow it. Our decision in *Caro* cannot be reconciled with the earlier decision in *Babbitt.* We are obligated to conform our decision to precedent.

Babbitt and *Caro* reach opposite conclusions on materially similar facts. The defendants in both capital cases

claimed ineffective assistance of counsel. In both cases defense counsel consulted with appropriate medical experts. In both, those experts did not refer defense counsel to other experts (in *Babbitt* post-traumatic stress disorder experts and in *Caro* pesticide toxicity brain disorder experts) that habeas counsel argued should have been consulted. In both cases, habeas counsel claimed that defense counsel at trial should have provided his medical experts with additional information that the experts did not ask for. In both, habeas counsel argued that more should have been brought out about the family circumstances of the defendant. *Babbitt* holds that an evidentiary hearing is not required, *Caro* holds that one is. The factual distinctions drawn by the majority are immaterial.

The relevant principle, applicable equally to both cases, is that where the medical experts counsel retained "did not state that they required the services of additional experts," there "was no need for counsel to seek them out independently." *Babbitt v. Calderon,* 151 F.3d 1170, 1174 (9th Cir.1998). And *Babbitt* rejects habeas counsel's focus "on what evidence his counsel could have obtained [regarding family and social background] rather than focusing on whether his counsel's investigative efforts were reasonable." *Id.* at 1175.

Good lawyers do not simply read the experts' advertisements in the legal newspapers until they find an expert who will say the right thing, and then use him. An expert who is not believed frequently sinks a case. Good lawyers often consult experts they know and trust, and consider their advice before going further. The majority opinion has the unintended, undesirable consequence of creating a Constitutional requirement that defense lawyers engage in inappropriate witness shopping.

The majority evidently misreads my view on prejudice. As explained below, I think there was none, even if Caro's lawyers' work had fallen below the *Strickland* standard, which it did not.

The majority suggests that I should not be permitted to say what a good lawyer would do, but then opines freely about what, in its opinion, any lawyer functioning as 'counsel' guaranteed by the Sixth Amendment (which is to say, *a fortiori,* any good lawyer) would do. Obviously all of us should and properly do use our experience as lawyers and judges to consider what competent lawyers do and whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The evidence about Caro's chemical exposure was massive, and brought out fully to the jury. Caro's experts had access to it. Dr. Benson employed a clinical social worker who gave him an extensive history of Caro's childhood and adolescence. Dr. Benson now swears that Caro's exposure to pesticides is a "necessary predicate" to forming a medical opinion. That may show that Dr. Benson did something wrong years ago, when he formed a medical opinion after taking the history he deemed necessary at that time, and did not explore pesticide exposure. It does not show that the lawyer did anything wrong. Nor does the fact that another of the doctors defense counsel used told Caro that in his opinion, people sentenced to death ought to have the option of committing suicide, show that the lawyer did not function as Sixth Amendment "counsel."

That Caro experienced skull trauma and chemical exposure that may cause brain damage, does not prove any link between those factors and Caro's crimes. Aspirin sometimes causes Reyes' syndrome in children, but that does not mean that anyone who has taken aspirin as a child should be assumed to have suffered Reyes' syndrome. If the child did not fall ill with Reyes' syndrome, then it does not matter that he took aspirin. Absence of the consequence makes the potential cause immaterial. One thing may be a medical cause of another in the

Williams, we affirmed denial of the writ, despite counsel's failure to examine his client's past medical records or seek appointment of an independent psychiatrist, and despite five psychiatrists' declarations submitted with the petition saying that he suffered from diminished capacity when he killed three people after raping one of them. We said that the evidence of Williams' "intent to kill and his ability to maturely and meaningfully reflect on his actions was simply overwhelming." *Id.* at 1470. Likewise here.

A. Deficient performance.

Today's decision does not take seriously the nature of our inquiry. The question is not whether we think Caro's lawyer could have done something more or better than he did. Nor is it whether, in almost two decades since Caro's death penalty was imposed, some lawyer or expert can think of something more that could have been said or done to try to persuade the jury not to impose the death penalty. The question is whether counsel's performance was so deficient that it was as if Caro had no lawyer at all. The answer, plainly, is "no."

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sense that it increases the probability of the consequence, but the consequence does not happen every time, and if it does not occur in a particular case, then the fact that the predisposing or causal factor was present does not prove anything that matters. Caro's experts did not find evidence of brain damage. So the fact that chemical exposure and skull trauma such as he had sometimes cause brain damage does not matter.

As it stands, I do not think the district courts and the bar can reconcile the majority decision with *Babbitt.* The majority has not articulated principles on which a distinction can be made. Without some meaningful principle to distinguish the cases, the decision whether a man lives or dies may ultimately not be controlled by neutral principles of law.

The Supreme Court told us how to analyze petitions for habeas corpus asserting ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The majority does not follow the required analytic approach. *Strickland* held that the petitioner had not sufficiently made out a case of ineffective assistance or prejudice. In *Strickland* as here, counsel was accused of failing adequately to develop medical evidence to show mental problems.

Strickland holds that petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052. We are required to apply "highly deferential" judicial scrutiny, which requires that "every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. 2052. The majority does not identify errors of that level of seriousness, does not review counsel's conduct with any deference at all, and applies nothing but hindsight.

The alleged errors of counsel that the majority identifies are (1) failure to investigate Caro's personal background, (2) failure to consult a neurologist or toxicologist, and (3) failure to provide those experts consulted with sufficient information. The record does not establish that counsel fell below *Strickland* standards with respect to any of these.

As to the first issue, Caro's personal background, the majority opinion does not attempt to identify anything that a minimally competent lawyer would have done that Caro's lawyer did not do. The majority mentions Caro's personal background and a physician's claim that his testimony would have been different had the physician known of Caro's "social and cultural history." The majority cites *Siripongs v. Calderon,* 35 F.3d 1308, 1310-13 (9th Cir.1994), for the proposition that "failure to present evidence necessary to bridge a cultural gap

may constitute ineffective assistance of counsel." But the majority does not relate these observations to the question of whether counsel in this case rendered ineffective assistance.

Caro's lawyer got both of Caro's parents to testify that they had sorely abused him. He also persuaded Caro's brother, a brother-in-law, a former girlfriend, an ex-wife, a friend from high school, Caro's high school football coach, Caro's boss at work, a vocational instructor from the prison Caro had served time in, a psychologist, and a licensed clinical social worker to testify. They told the jury all about Caro's background, culture, and suffering. They told the jury about how impoverished the family was, and about how Caro suffered from prejudice on account of his Mexican-American Yaqui heritage, and how Caro was called "Stinky" in school because he stunk of pesticides. What does the majority think a minimally competent lawyer would have done to investigate and "bridge a cultural gap" that Caro's lawyer did not do? I have no idea, because the majority opinion does not say. I also have no idea what Caro's proud heritage has to do with murder.

The meat of the majority opinion is that Caro's lawyer did not do enough to find the right experts and educate them about Caro's background. The opinion errs because it lacks a clear focus on the question: whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. Suppose an evidentiary hearing were held, at which the most helpful possible propositions for Caro were proved: (1) that the only reason counsel did not do more was that he did not think of it, and (2) that had counsel done more, he would have found a toxicologist who would testify that pesticide exposure such as Caro had suffered can cause brain damage. That does not add up to a colorable claim of performance below the *Strickland* standard.

Caro's lawyer consulted two psychiatrists, a clinical psychologist, and a licensed clinical social worker, in his diligent attempt to develop evidence of some sort of mitigating mental or emotional condition. The psychiatrists were of course medical doctors. One had, in addition to his M.D., two Ph.D. degrees, in physiology and pharmacology. It is the expert's duty, not the lawyer's, "to recognize what information he needs in order to render an opinion." *Coleman v. Calderon,* 150 F.3d 1105, at 1115 (9th Cir.1998).

The majority accepts Caro's new lawyers' claims that his lawyer at sentencing should have consulted a toxicologist or neurologist. Even if that would have been desirable, it does not establish "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. A lawyer defending a criminal case is entitled to rely on a physician to tell him whether another physician in a different specialty is needed. People commonly rely on their own physicians to guide them to the appropriate specialists, in matters of their own life and death. It is the doctor's fault, not the patient's, if the physician does not offer the appropriate guidance.

> [I]n the absence of a specific request, counsel does not have a duty to gather background information which an expert needs. Part of the skill of an expert is to recognize what information he needs in order to render an opinion. To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert.

Coleman v. Calderon, 150 F.3d 1105, at 1115 (9th Cir.1998) (internal citation and quotation omitted). That one of the psychiatrists now says that if he had learned more about

Caro, he would have testified differently, reflects badly on the psychiatrist, not on Caro's lawyer. If the doctor needed to know more to form a reliable opinion, he should have asked. The two physicians (one also an expert in pharmacology) did not tell Caro's lawyer to look for evidence of exposure to toxic chemicals or to consult a toxicologist. Evidently they did not think of it, and did not think of asking questions when taking medical histories that would lead them to think of it. So why should a minimally competent lawyer have thought of it?

What Caro's lawyer's experts told him gave him no reason to shop for more evidence on brain damage, mental defect, psychiatric problem, or any other such theory to mitigate punishment. The psychologist, Dr. Leifer, found that Caro was "functioning within the superior range of psychometric ability," with an I.Q. of 124. He found that Caro had "no gross or significantly manifested evidence of psychotic disorganized functioning." Caro went to college, where he performed satisfactorily until his girlfriend broke up with him in his senior year. Then he joined the Marines, where he did so well that he became a commissioned officer, a lieutenant; he was discharged after the rape and kidnapping. Despite a history that could have led to some sort of relevant brain damage, the two psychiatrists and the psychologist who studied Caro did not find any. If these experts could not think of anything else to ask about Caro's history, find brain damage, or think to suggest consulting a toxicologist or neurologist, *a fortiori* Caro's lawyer was not incompetent for failing to do so.

Caro's lawyer made the best of what his experts gave him, by having the psychologist testify that despite his intelligence and apparent normality, Caro had a mental defect which could be a result of child abuse. The defect would cause "sudden lapses where the quality of reality testing is gone under aggressive and demonic themes." Caro's lawyer built on this with massive evidence of child abuse.

A lawyer who sends his defendant to two psychiatrists and a psychologist to try to find some mitigating evidence regarding mental condition has done enough. That years later, a new army of lawyers have found a professor at Yale Medical School who has thought of something more that could have been shown, a theory that exposure to pesticides might have damaged Caro's brain[2/], is entirely irrelevant to the question: whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052.

B. Prejudice.

The other half of *Strickland* is that the petitioner must "affirmatively prove prejudice." *Strickland,* 466 U.S. at 693,

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2. The majority responds to my dissent by attacking what it calls my "disdain for the Yale Medical School." I have no idea what my reference to Yale Medical School has to do with "disdain." The point is that a lawyer does not have a duty to gain access to and testimony from a professor at one of the most eminent institutions in the country, in order to be minimally competent. Though Caro's lawyer did not scale the walls of Yale, he did consult several other highly qualified experts. They did not refer him to someone more specialized or learned, or advise him that he needed to consult someone else.

Caro's new submissions do not even claim that in December 1981, when the jury returned a verdict of death, the medical literature established that exposure to the chemicals in pesticides may cause brain damage. For all we know from the record, the medical basis for the majority opinion developed in the medical literature during the years that have elapsed since the jury decided this case. If so, no lawyer, however diligent, could have proved then what is claimed now.

104 S.Ct. 2052. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* Yet a "conceivable effect" is the most that Caro's new lawyers have even arguably suggested. The Court defined the test as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. In *Strickland,* and in *Williams v. Calderon,* 52 F.3d 1465 (9th Cir.1995), despite some additional evidence that might have been used to show medical problems, it would have made no difference. Likewise in this case.

The Court instructed us in *Strickland* that we "must consider the totality of evidence before the judge or jury" in determining whether there was a reasonable probability of a different result, but for unprofessional errors. Yet the majority pointedly avoids considering the "totality" of evidence. A reader of the majority opinion cannot even find out what Caro did. But the jury knew. It is our duty to consider the "totality of evidence," not just the evidence generating sympathy for Caro, to decide whether introduction of the new toxicology evidence probably would have changed the jury's collective mind.

At around seven on a summer evening, two teenaged cousins, Mary Booher and Mark Hatcher, went bicycle riding together. Their mother and grandmother went out to meet them a half hour later, and heard a shot. Soon after, they found Mark, shot in the face, dead. Their bicycles were found the next day in a ditch, but Mary had disappeared. She was found five days later in an orange grove, shot in the head, dead and decomposing. Caro had killed the boy, kidnapped the girl, and then killed her too.

After killing the boy and kidnapping the girl, Caro careened away from the scene in his pickup truck, with the

bicycles in the bed, and clipped a car in the parking lot of a bar. When he did not stop, the car owner and his friend chased and caught him. Caro got out of his truck and said "don't hurt me," while hiding one hand. One of the men told him they were not going to hurt him, but wanted to know if he had insurance. Caro then exposed his hidden hand with a gun in it, shot that man in the face, and shot the other man in the thigh. Then he approached the first man, who was on the ground, and shot him again, in the chest. Then he chased the other man, who was fleeing despite his wound, and continued to shoot at him until he ran out of bullets. Miraculously, both men lived and testified. *People v. Caro,* 46 Cal.3d 1035, 251 Cal.Rptr. 757, 761 P.2d 680 (Cal.1988).

Caro hid his pickup truck. He shaved off his mustache. After getting caught, he repeatedly tried to escape. He gave a false alibi. He did not testify at his trial. Bullet fragments from Mark's brain and the wall of a house where the man shot in the thigh had fled, matched Caro's girlfriend's gun, which he had access to at the time. The paint on the car clipped in the bar parking lot matched the paint on Caro's pickup truck. The man shot in the thigh recalled Caro's license plate number almost exactly. Extensive additional evidence made the case irrefutable. A state superior court jury convicted Caro of two counts of first degree murder with use of a firearm, one count of kidnapping with use of a firearm, and two counts of assault with intent to murder with aggravating factors.

The sentencing jury learned of two additional murders that Caro had apparently committed. Two teenaged girls were found dead in an orchard, shot in the head, with a bullet fragment from Caro's girlfriend's gun. The girlfriend could not have done it, because semen was found in the vagina of one of the girls. The jurors had been instructed that they could not consider these murders unless they unanimously found beyond a reasonable doubt that Caro had committed them, and four

jurors were not so persuaded, so presumably the jury did not consider them.

A live victim of one of Caro's former crimes also testified, a superior court commissioner. When she was a law clerk six years before, she took a bus to work, but it stopped and discharged all the passengers some miles away. She tried to hitchhike into work, and Caro picked her up. Once he had her in the car, he pulled a gun and threatened to kill her if she did not do what he said. He kidnapped her, driving her far into the desert. She tried to get away during the four hours he held her by insisting she had to go to the bathroom at a gas station, but Caro came into the ladies' room and forced her out and forced her back into the car. Far from town, he got her out of the car, made her strip naked, and raped her. Eventually she made a daring escape into traffic on a freeway. Caro was caught, pleaded guilty to kidnapping in exchange for dismissal of other charges, and served some time.

In *Strickland* and in *Williams,* with no more horrible facts, it was held that the additional evidence would probably have made no difference to the outcome. Likewise here, Caro could at most demonstrate a "conceivable effect," *Strickland,* 466 U.S. at 693, 104 S.Ct. 2052, not a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. The jury knew that he had murdered a teenaged boy and girl who had no relationship to him at all. Then he tried to kill two men who got in his way. This was no aberrational lapse from a pattern of good behavior. Six years before, he had kidnapped a woman for an extended period and raped her. Caro's relentlessness was demonstrated when he pursued his kidnap and rape victim into the ladies' bathroom, and again when he pursued the two men whose car he had hit until he ran out of bullets.

In *Williams,* we said that the evidence "was so clear, lucid and powerful that no psychiatrist would have made a difference." *Williams,* 52 F.3d at 1470. Caro's lawyer put extensive mitigating expert and lay testimony before the sentencing jury. The jury heard 39 witnesses. In the case at bar, it is even more unpersuasive than in *Williams* to suggest that one more expert would have made a difference. The defense could have put on a toxicologist to say that Caro's exposure to pesticides killed some brain cells. The prosecutor could have put on a physician to say that every stroke victim has suffered death of brain cells yet still ordinarily knows right from wrong and does not shoot people.[3/] The jury would have been

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3. The majority claims that my ignorance of medicine disables me from understanding what the majority, without reference to any authority in the record or learned treatises, claims, that brain damage from stroke "does not cause aggressive behavior." Sometimes it does. "Only a few patients become serious *behavior problems* or are psychotic after a stroke, but paranoid trends, ill temper, stubbornness, and peevishness are recognized sequelae." Mohr, Fisher and Adams, Cerebrovascular Diseases 1924, in Harrison's Principles of Internal Medicine (9th ed.1980) (emphasis in original).

Brain damage does not commonly cause murder, so is not necessarily an excuse for murder. Many people suffer destruction of brain cells, from stroke, trauma, toxins, and other causes. Few kill. Even in the unlikely event that a minimally competent lawyer should have found a witness to testify that Caro's exposure to pesticides may have damaged his brain, this record still would not establish prejudice from the absence of such testimony. Proving that pesticides may cause brain damage does not prove that they did, and proving that they did does not prove that Caro should be partially excused for murdering the boy and girl riding their bicycles. A jury would not necessarily assume that anyone with brain damage would, as a result, be compelled by his disorder to kill. Considering all

left with the brutal murder of two young people on bicycles, the relentless attempted murder of getaway witnesses, the kidnapping and rape six years before, and the demonstrated ability to perform at an extraordinarily high level on intelligence tests and in the Marines.

Because Caro has presented no evidence, either of errors by counsel so grave that it is as though he had no lawyer at all in the Sixth Amendment sense, or of prejudice from the errors he claims counsel made, we should follow our own precedent in *Williams* and affirm.

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the mitigating evidence that did not persuade the jury to refrain from the death penalty, there is no particular reason to suppose that this additional evidence would have mattered.

It is also significant that, even after almost two decades of post- sentencing litigation, Caro's latest lawyers and doctors have not come up with definitive evidence that he is brain damaged now, or was at the time he killed the boy and girl riding their bicycles. His new experts suggest that he may have been brain damaged, based on what some chemicals in pesticides sometimes can do, clinical impressions, and Caro's own reports of his abnormal feelings and unfortunate history. This is a weak case for prejudice from ineffective assistance. Plenty of people who grew up on farms, constantly exposed to pesticides, feel fine, and do not kill anyone. That some of the individuals exposed to certain chemicals may suffer brain damage, which may contribute to disorders of feeling and thought, does not establish that all persons so exposed are free of responsibility for what they do.

OPPOSITION BRIEF

Supreme Court, U.S.
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(3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

JEANNE WOODFORD, Petitioner,

v.

FERNANDO EROS CARO, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DEATH PENALTY CASE

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STATEMENT OF THE CASE

In *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (*Caro I*) (App. C), the court of appeals held that the performance of Caro's trial counsel with respect to penalty phase investigation was constitutionally deficient. The court noted that although the sentencing jury had been presented with evidence that "Caro was beaten and suffered head injuries as a child" and that "Caro worked as a [pesticide] flagger in high school and at an agricultural chemical company as an adult," the jury did *not* "have the benefit of expert testimony to explain the ramifications of these experiences on Caro's behavior." *Caro I*, 165 F.3d at 1227; App. C at 43, 47. The court concluded that "[e]xpert evidence is necessary on such issues when lay people are unable to make a reasoned judgement alone." *Caro I*, 165 F.3d at 1227; App. C at 47.

Accordingly, having held that the deficient performance prong of *Strickland*[1] had been met, the court of appeals remanded the case to the district court to determine the presence or absence of the factual predicate necessary for Caro to establish the prejudice prong and thus prevail on his claim of ineffective assistance of counsel at the penalty phase:

> Caro is therefore entitled to an evidentiary hearing to determine whether he suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable.

Caro I, 165 F.3d at 1228; App. C at 50. From the *Caro I* decision, the State sought a Writ

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

of Certiorari, which this Court denied. *Woodford v. Caro*, 527 U.S. 1049 (1999).

Faced with overwhelming credible evidence of Caro's unusual history of pesticide exposure and his abusive childhood, the State entered into a lengthy joint statement of undisputed facts, which set forth in great detail the factual bases for Caro's claim. Those bases included his exposure to dozens of different pesticides from childhood through adolescence and into adulthood, as well as his history of suffering physical abuse and head injuries. Caro presented the videotaped testimony of three highly qualified experts, which established Caro's frontal lobe brain damage and demonstrated how such brain damage was caused by Caro's history of extensive pesticide exposure and his background of physical abuse and repeated head injury. The State presented no evidence.

At the conclusion of the hearing, the district court found that "[t]he record before the Court *irrefutably* establishes that Petitioner suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background." App. B at 38, emphasis added. Thus, in accordance with the court of appeals' holding "that trial counsel's failure to present such evidence to the jury rendered the results of Petitioner's penalty phase unreliable," the district court granted the writ with respect to Caro's penalty phase. App. B at 38-39.

On the State's appeal from the district court's order, the court of appeals held: "[c]onsidering the testimony presented at the evidentiary hearing, the District Court was not clearly erroneous in finding that Caro suffered from brain damage as a result of his

exposure to neurotoxicants and his personal background." *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) (*Caro II*); App. A at 19. The court further held that "[b]ecause it has been established that Caro suffers from brain damage, the delicate balance between his moral culpability and the value of his life would certainly teeter towards life. … [C]onsidering all the facts of the case, Caro is entitled to relief on his ineffective assistance of counsel claim." *Id.* From the *Caro II* decision, the State now seeks a Writ of Certiorari.

SUMMARY OF ARGUMENT

The State has petitioned this Court for Writ of Certiorari because, in its view, the court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court."[2] Sup. Ct. R. 10(c); *see* Pet. at 17. Specifically, the State complains that the court of appeals "established both performance and prejudice tests that

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[2] The State also hastily claims that the decision in this case conflicts with decisions of other circuit courts of the United States Court of Appeals. *See* Pet. at 17, 15, n.12. The cases the State cites in note 12, however, do not support such a claim. *See, e.g., Poyner v. Murray*, 964 F.2d 1404, 1418 (4th Cir. 1992) (ineffective assistance of counsel claim rejected because "Poyner's complaint here seems aimed not at the performance of his counsel but rather at the performance of [the examining psychiatrists who] … were not experienced or imaginative enough to recognize that Poyner might have been motivated by sexual sadism, the crime-spree killer phenomenon, or some other psychological disorder that might support an argument that Poyner's killings were motivated by more than just a desire to evade capture and prosecution for robbery"); *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir. 1995) (ineffective assistance of counsel claim rejected; trial counsel's decision to not present certain mitigating evidence was reasonable and strategic because evidence could have been viewed by the jury as aggravating); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) (ineffective assistance of counsel claim rejected; counsel not on notice that further investigation warranted because "reports of four mental health experts were unanimous in their conclusion that Card had been sane at the time of the offense, and one report specifically discounted the existence of schizophrenia").

are fundamentally at odds with *Strickland*." Pet. at 11.

In fact, this case involves nothing other than an unremarkable application of *Strickland*. The court of appeals issued a decision based on a careful and thorough review of the facts and evidence presented in the state and federal proceedings in this case, and a reasonable application of those facts to firmly settled law set forth in *Strickland* and its progeny. In its opinion, the court of appeals repeatedly cited *Strickland*, analyzed the facts of this case under *Strickland's* performance prong and prejudice prong, and concluded that both prongs were met. *Caro II*, 280 F.3d at 1254-58; App A. at 10-19. Because the court so found, Caro was granted relief as to penalty. *Caro II*, 280 F.3d at 1258; App. A at 19.

The State attempts to create a legitimate issue for this Court's review by presenting the appellate court's routine application of *Strickland* as a wild deviation that will inevitably open the floodgates of death sentence reversals. Pet. at 11, 17. This is a rather disingenuous argument, however, for if the State were so concerned with this "new" *Strickland* standard crafted by the court of appeals, surely it would have asked this Court to quash it in its Petition for Writ of Certiorari in *Caro I* when the alleged errant standard first appeared.[3]

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[3] The State's sole Question Presented in its Petition for Writ of Certiorari from *Caro I* read: "[w]hether the standard of *Strickland v. Washington*, 466 U.S. 668 (1984) requires reversal of a death sentence because trial counsel did not investigate a mental defense to which he was not alerted by licensed mental state experts whom counsel consulted and called to testify at trial." App. D. Curiously, the State's sole Question Presented in its Petition for Writ of Certiorari from *Caro II*, "[w]hether the Sixth Amendment right to effective assistance of counsel requires a

In addition, the State's argument is belied by many decisions from the court of appeals since *Caro I*, in which the court explicitly *rejected* claims of ineffective assistance of counsel at the penalty phase due to trial counsel's failure to investigate and present mitigating evidence. *See, e.g., Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002) (mandate stayed by *Pizzuto v. Arave*, 280 F.3d 1217 (9th Cir. 2002) pending this Court's decision in *Ring v. Arizona*); *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001); *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001) (*reh'g en banc granted by Payton v. Woodford*, 273 F.3d 1271 (9th Cir. 2001); *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000); *Babbitt v. Calderon*, 151 F.3d 1170 (9th Cir. 1998). Left with little else, the State resorted to painting the decision in this case as the introduction to an endless parade of horribles. This Court, however, should not expend its resources to entertain such sheer desperation. The State's Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. This Court Should Deny The State's Petition For Writ Of Certiorari Because Its Reasons For Granting The Writ Are Neither Factually Nor Legally Accurate.

The State, relying on the dissenting opinion in this case, professes fear that the court of appeals' decision will "require reversal of a death sentence whenever any new or

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defense attorney to 'unearth' and present 'all relevant mitigating information … for consideration at the capital sentencing phase'" bears a striking resemblance to language which first appeared in the court of appeals' opinion in *Caro I*: "[i]t is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro I*, 165 F.3d at 1227; App. C at 46.

additional information is uncovered after the trial." Pet. at 11, citation omitted. The State complains that the court of appeals blazed a new *Strickland* trail by creating a "remarkable departure from the reasonableness standard of *Strickland*," and then by jettisoning the prejudice prong. Pet. at 13-14, 16. The State's complaints are unfounded.

Contrary to the State's characterization, what the court of appeals did was nothing other than a standard application of *Strickland* to the facts of the case.[4] After a lengthy discussion of those facts in light of both *Strickland* and this Court's recent decision in *(Terry) Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitute[d] deficient performance"), the court concluded that trial counsel in this case had rendered deficient performance. *Caro II*, 280 F.3d at 1254-56; App. A at 10-15.

The court found that trial counsel's performance was objectively unreasonable because:

> counsel was aware of Caro's extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined Caro of those facts that were known to him. Further, despite counsel's awareness of these facts, he failed to seek out an expert to assess

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[4] Even if the State's complaint that the court of appeals misapplied *Strickland* were accurate, that complaint remains relatively unavailing in meeting this Court's high bar for granting certiorari. *See* Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law"). Moreover, given that trial counsel failed to present to the jury deciding Caro's fate the effects on his brain of "'the worst case ... of multiple exposures almost a lifetime, until his incarceration, of exposures to pesticides, from in utero right through infancy to adulthood'" (*Caro II*, 280 F.3d at 1253, citation omitted; App. A. at 8), this case hardly seems like the proper case by which to address the State's complaint that the court misapplied *Strickland*.

> the damage done by this poisoning of Caro's brain. … "All counsel had to do was ask the question '[w]hat did all that extraordinary exposure to chemicals do to his brain?' And then, in order to find the answer, he merely had to address the question to either a neurologist or a toxicologist."

Caro II, 280 F.3d at 1255, quoting *Caro I*, 165 F.3d at 1228; App. A at 12. The court further found that trial counsel's performance was objectively unreasonable because he "failed to present testimony at the penalty phase of trial explaining the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child. … [Such] testimony … would have imparted upon the jury the detrimental impact that child abuse had on Caro's brain." *Caro II*, 280 F.3d at 1255; App. A at 12.

Rather than what the State terms a "remarkable departure from the reasonableness standard of *Strickland*," the court's analysis amounted to nothing other than a straightforward application of that standard. The State's dissatisfaction with the court's ultimate conclusion in no way alters the fact that the court conducted a thorough and proper *Strickland* analysis to reach it.

After finding trial counsel's performance deficient under *Strickland*, the court continued on to *Strickland's* second prong and analyzed whether "Caro was prejudiced by his attorney's incompetence." *Caro II*, 280 F.3d at 1256, citing *Strickland*, 466 U.S. at 687; App. A at 15. Before applying *Strickland's* prejudice prong to the facts of this case, the court, citing both *Strickland* and *(Terry) Williams,* observed that the relevant inquiry "compels [the court] to couple the omitted evidence with the mitigating evidence presented at trial and reweigh it against the aggravating evidence to determine whether

the omitted evidence 'might well have influenced the jury's appraisal of … [the defendant's] moral culpability.'" *Caro II*, 280 F.3d at 1256-57, citing *(Terry) Williams*, 529 U.S. at 398; App. A at 15. With this Court's words as its guide, the court concluded that Caro was, in fact, prejudiced by trial counsel's deficient performance.[5] *Caro II*, 280 F.3d at 1258; App. A at 18.

Crucial to the court's determination were the facts that "[t]he only expert testimony presented relating to Caro's mental health did not shed light on his brain damage," and that the "compelling" evidence that was omitted meant that "[t]he jury was not afforded the benefit of expert testimony explaining the effects that Caro's *physiological* defects would have on his behavior. *Caro II*, 280 F.3d at 1257, 1258, emphasis in original; App. A at 17. Therefore, the court found trial counsel's deficient performance prejudicial not, as the State implies, because *some* additional mitigating evidence could have been presented to the jury, but because the *specific* additional mitigating evidence that was not presented to the jury was absolutely paramount to its understanding of Caro's "moral culpability" for his crime. *(Terry) Williams*, 529 U.S. at 398. Indeed:

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[5] The court of appeals' routine application of *Strickland* is entirely in step with a decision from the United States Court of Appeals for the Tenth Circuit issued one month prior to this decision. In that case, the court remanded for an evidentiary hearing to determine trial counsel's reasons -- or lack thereof -- for foregoing the use of expert testimony during the penalty phase regarding the effects steroid use would have had on the defendant. *Sallahdin v. Gibson*, 275 F.3d 1211, 1237-41 (10th Cir. 2002). Much like what the court of appeals ordered in its original mandate in *Caro I*, the court in *Sallahdin* noted that if, after the hearing, it were established that trial counsel erred in failing to use the expert testimony, the defendant would be entitled to a new sentencing proceeding. *Id.* at 1240-41.

> A little explanation can go a long way. In this case, it might have made the difference between life and death. But, because trial counsel for Fernando Eros Caro failed to investigate and present evidence of the impact that exposure to neurotoxicants and child abuse had on his brain, the penalty phase jury was deprived of this critical explanation in determining Caro's culpability for his crime.

Caro II, 280 F.3d at 1249-50; App. A at 1-2. The court of appeals' application of *Strickland's* prejudice prong, therefore, is entirely consistent with this Court's recent decision in *(Terry) Williams*:

> We do not agree with the Virginia Supreme Court that Judge Ingram's [the judge who presided over both Williams's trial, sentencing, and state habeas evidentiary hearing] conclusion should be discounted because he apparently adopted "a per se approach to the prejudice element" that placed undue "emphasis on mere outcome determination." [Citation.] Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the *totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.*

(Terry) Williams, 529 U.S. at 397, emphasis added.

The court of appeals thoroughly analyzed the facts of this case under both prongs of *Strickland*, and did not, as the State would have it, "establish[] both performance and prejudice tests that are fundamentally at odds with *Strickland.*" Pet. at 11. Seeking to bolster its baseless claim that the court of appeals' decision in this case will "require reversal of a death sentence whenever any new or additional information is uncovered after the trial" (Pet. at 11; *see also* Pet. at 17), the State cites to *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (penalty relief based on ineffective assistance of counsel); *Karis*

v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (same); and *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002) (remand for evidentiary hearing based on ineffective assistance of counsel at penalty phase). Pet. at 11, n.8. While the State is correct in its description of the outcomes in *Silva*, *Turner*, and *Karis*, the State is entirely incorrect in implying that the court of appeals' decisions in those cases were a direct result of the court of appeals' decision in this case.

In *Silva*, the court of appeals conducted a thorough and exhaustive *Strickland* analysis, spanning 15 pages of the opinion. *Silva*, 279 F.3d at 836-50. The court began its analysis by discussing the performance prong, noting that trial counsel completely "abandon[ed] investigation into mitigating evidence" at the direction of his client, but without adequately informing his client of the potential consequences of that decision. *Id.* at 838. Following that introduction, the court, after repeatedly citing both *Strickland* and *(Terry) Williams*, concluded that trial counsel's "abandonment of the investigation into Silva's background -- including his family, criminal, substance abuse, and mental health history -- was unreasonable in that it did not meet professional norms prevailing at the time of Silva's trial, and that it therefore amounted to constitutionally deficient performance under the totality of the circumstances." *Id.* at 846.

After finding deficient performance, the court went on to discuss the prejudice prong. The court began its prejudice analysis by acknowledging that "[a]lthough we do not presume prejudice in a case such as this, we must be especially cautious in protecting

a defendant's right to effective counsel at a capital sentencing hearing." *Silva*, 279 F.3d at 847, citation omitted. The court, again, after more citations to *(Terry) Williams*, concluded that trial counsel's deficient performance during the penalty phase was "highly prejudicial." *Silva*, 279 F.3d at 850. After noting that questions from the jurors to the trial judge regarding the meaning of "life without parole" "suggest that a death sentence for Silva was not a foregone conclusion," the court explained:

> [trial counsel's] failure to investigate Silva's background and to prepare evidence relating to his family history, mental health, and substance abuse problems resulted in an egregious failure to uncover and present a raft of potentially compelling mitigating evidence. Such performance violated norms of reasonableness prevailing at the time of Silva's trial and substantially undermines our confidence in the results of the penalty phase.

Id. at 849-50.

Thus, unlike the State's portrayal of *Silva* as a "reversal of a death sentence whenever any new or additional information is uncovered after the trial," *Silva* was, in fact, a penalty reversal because trial counsel rendered deficient performance by completely "abandon[ing] investigation into mitigating evidence;" such deficient performance prejudiced Silva by depriving the jury determining his fate the opportunity to hear and consider "a raft of potentially compelling mitigating evidence." *Silva*, 279 F.3d at 838, 850.

As in *Silva*, the court of appeals in *Karis* thoroughly analyzed for 10 pages the facts of the case under *Strickland*, citing both *Strickland* and *(Terry) Williams*. *Karis*, 283 F.3d at 1132-41. In explaining its conclusion that trial counsel's performance was

deficient, the court observed that trial counsel "presented mitigation evidence for only 48 minutes." *Id.* at 1135. Notably absent from this "meager presentation" was "'substantial and wrenching evidence' of Karis' violent and abusive childhood" of which trial counsel was aware but utterly unprepared to present due to the lack of a reasonable investigation. *Id.* at 1136, 1139, 1140, citation omitted.

After concluding that trial counsel rendered deficient performance, the court found that "[c]ounsel's error in failing to investigate and present the highly relevant information of an abusive childhood was prejudicial." *Karis*, 283 F.3d at 1140. The court explained that the information could have been offered to rebut the prosecutor's "piercing" argument regarding the absence of mitigation. *Id.* The court further observed that "even with the weak mitigation evidence that was presented, the jury was out for three days before rendering its verdict," and that evidence of Karis' violent and abusive childhood was important for the jury's "understanding [of] the root of Karis' criminal behavior and his culpability." *Id.* Thus, as was the case in *Silva*, the court granted penalty relief because trial counsel rendered deficient performance that was prejudicial to Karis in that trial counsel was aware of compelling mitigating evidence which, as in *Caro*, helped explain the defendant's criminal behavior, but failed to investigate and present it to a jury which was having great difficulty choosing between life and death. *Karis*, therefore, is not, as the State contends, a case where the court granted penalty relief because "new or additional information [was] uncovered after the trial." Pet. at 11.

Finally, in *Turner*, the court of appeals held that Turner had met the standard for an evidentiary hearing because the record clearly established that trial counsel "was not prepared to begin the penalty phase when the jury returned its verdict of first degree murder. Even the State informed the court that, 'in all fairness to the defendant,' the defense needed more time to prepare for this phase of the trial." *Turner*, 281 F.3d at 894. In support of its decision, the court further noted:

> It is also clear from the record that [trial counsel] was on notice of both Turner's history of extensive drug use and of his claim to have smoked P.C.P. on the day of the homicide. Despite this information, [trial counsel] did not question any of his penalty phase witnesses about Turner's drug use. Nor did [trial counsel] call any additional experts to supplement [guilt phase psychologist] testimony about the effects of P.C.P., even though the focus of the two phases was completely different: At the guilt phase [trial counsel] was trying to establish lack of premeditation and intent as a defense, while at the penalty phase, [trial counsel] should have been trying to make Turner seem less culpable and therefore more deserving of life.
>
> Not only did [trial counsel] fail to question Turner's mother, half-sister, and cousin, all of whom he called to testify at the penalty phase, about Turner's drug use, he also failed to question them about whether Turner's father was abusive towards his children or whether there was any history of substance abuse in the family. In sum, [trial counsel] did nothing to demonstrate that Turner's actions were influenced by his early childhood.

Turner, 281 F.3d at 894.

Thus, the court of appeals remanded for an evidentiary hearing in *Turner* not because it "established both performance and prejudice tests that are fundamentally at odds with *Strickland*" (Pet. at 11), but because if Turner's allegations that trial counsel was not prepared to begin the penalty phase and that trial counsel was on notice of, but

failed to investigate and present, compelling mitigating evidence regarding Turner's drug use and physical abuse suffered as a child were proven at the evidentiary hearing, deficient performance and prejudice would be established. *Turner*, 281 F.3d at 890.

The State cited to these three decisions from the court of appeals as proof that the decision in this case will "require reversal of a death sentence whenever any new or additional information is uncovered after the trial." Pet. at 11, n.8; *see also* Pet. at 17. The State, however, failed to perform even a cursory analysis of the reasons behind the results in those three decisions. Had the State done so, it would have realized that its justification for granting the writ, along with the cases it cited in support thereof, were inapposite. The State's Petition for Writ of Certiorari should be denied.

II. This Court Should Deny The State's Petition For Writ Of Certiorari Because This Court Is Not The Appropriate Forum For Resolving Factual Disputes.

In the appellate court's opinion, Judge Kleinfeld noted in dissent that "[*Caro I*] limited the evidentiary hearing to this question: 'whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background.' That was all the district court was mandated to do, and that is what it did." *Caro II*, 280 F.3d at 1259 (Kleinfeld, J., dissenting); App. A at 19. Judge Kleinfeld was correct. The court of appeals in *Caro I* remanded the case to the district court with a limited mandate to answer one specific factual question: was Caro brain damaged. App. C at 50. After a lengthy joint statement of undisputed facts and an extensive evidentiary hearing, the district court

answered that specific factual question affirmatively, thus entitling Caro to penalty relief. App. B at 38-39. In *Caro II*, the court of appeals upheld the district court's factual finding on that limited question: "[c]onsidering the testimony presented at the evidentiary hearing, the District Court was not clearly erroneous in finding that Caro suffered from brain damage as a result of his exposure to neurotoxicants and his personal background." *Caro II*, 280 F.3d at 1258; App. A at 19.

By its own decree, this Court is not the appropriate forum for addressing a claim of erroneous factual findings by a lower court: "[w]e do not grant a certiorari to review evidence and discuss specific facts." *U.S. v. Johnston*, 268 U.S. 220, 227 (1925); *see NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition; petition presented primarily a question of fact, "which does not merit Court review"); *Rudolph v. United States*, 370 U.S. 269 (1962) (*per curiam*); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918); Sup. Ct. R. 10 (Petition for Writ of Certiorari "is rarely granted when the asserted error consists of erroneous factual findings").

Indeed, this Court is especially loathe to review issues of fact when a district court's factual findings command approval from the reviewing appellate court. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence

of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949), citations omitted. Instead, a Petition for Panel Rehearing and Suggestion for Rehearing en Banc following an adverse decision from the court of appeals is the appropriate vehicle for considering facts "overlooked or misapprehended ... ." Fed. R. App. P. 40(a)(2). The State filed such a pleading in this case, and failed to receive a vote. Apps. E & F.

Here, the district court, after lengthy fact-finding proceedings, concluded that "[t]he record before the Court *irrefutably* establishes that Petitioner suffered brain damage as a result of his exposure to toxic pesticides as well as his personal background." App. B at 38, emphasis added. Following the district court's factual finding, the court of appeals reviewed it, and concluded that the decision was not clearly erroneous. *Caro II*, 280 F.3d at 1254; App. A at 6, 19. Already, two courts have made or affirmed a factual finding in this case; this Court need not become a third court of involvement. *Graver Tank & Mfg. Co*, 336 U.S. at 275. The State's Petition for Writ of Certiorari should be denied.

CONCLUSION

This case involves a court of appeals' routine application of this Court's clearly established precedent set forth in *Strickland*. Far from "establish[ing] both performance and prejudice tests that are fundamentally at odds with *Strickland*," the court of appeals cited *Strickland*, applied its two-part test, and concluded that on the facts of this case, both the performance prong and the prejudice prong were met. The State's dissatisfaction with the result in no way warrants this Court's intervention. The State's Petition for Writ of Certiorari should be denied.

DATED: 5/21/02

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 28 2002

No. 01-1562

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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Respondent Caro's Brief in Opposition further demonstrates the need to grant certiorari. Our reply is briefly stated.

1. Caro insists the Ninth Circuit "conducted a thorough and proper *Strickland*[1] analysis . . . ." Opp. at 7. Conspicuous by its absence, however, is any defense of the circuit court's deficient performance analysis, an omission that is not surprising inasmuch as the court provided none. Caro effectively concedes that the court based its finding of inadequate performance solely on the development of new evidence in the habeas corpus proceedings. The district court so found and Caro makes no effort to contest that conclusion. As demonstrated in the petition, the circuit court ignored the several mental health experts hired by trial counsel, the negative results from testing of Caro's blood for pesticide residue, and the extensive mitigation case actually presented at trial. The Ninth Circuit's per se rule of deficient performance based solely on newly created evidence is inconsistent with *Strickland*, as the Court again emphasized this Term. *Bell v. Cone*, No. 01-400

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1. *Strickland v. Washington*, 466 U.S. 668 (1984).

(May 28, 2002).

2. Caro suggests the State waived any objection to the circuit court's requirement that counsel find and present all available mitigation by not challenging that language in our petition for certiorari from *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) [*Caro I*]. Opp. at 4-5 and n. 3. As explained in the petition, it is the Ninth Circuit's conversion of an admonition on the importance of seeking out mitigation into a rule automatically converting the failure to find mitigation into deficient performance that directly contradicts this Court's jurisprudence on ineffective assistance of counsel. Pet. at 13-14 and n. 10.

3. Caro acknowledges that the finding of prejudice was based primarily, if not solely, on the absence of specific additional mitigation. Opp. at 8-9. The circuit court concluded it was bound to find that evidence mitigating and its absence prejudicial yet made virtually no effort to assess the evidence in light of the extensive mitigation case actually before the jury or the overwhelming evidence in aggravation. The suggestion, endorsed by Caro, that the absence of a single, specific type of mitigation will necessarily establish prejudice cannot be reconciled with the requirements of *Strickland*.

4. Contrary to Caro's assertion, Opp. at 14-16, petitioner is not seeking to relitigate lower court fact findings. The petition does not contest the district court's finding that Caro had proven brain damage. Rather, the question is whether the development of such evidence in habeas corpus proceedings is alone sufficient to establish both the performance and prejudice prongs of *Strickland*. The Ninth Circuit found it could, creating in effect a per se rule of reversal whenever new mitigation is created in collateral proceedings. That rule effectively eviscerates the *Strickland* standard.

CONCLUSION

For the above reasons and those set forth in the petition certiorari should be granted.

Dated: May 28, 2002

Respectfully submitted,

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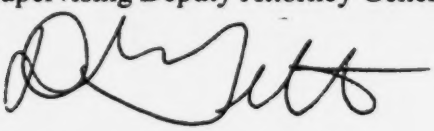

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No. 01-

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CERTIFICATE OF SERVICE BY MAIL

DANE R. GILLETTE, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 13000, in the City and County of San Francisco, State of California; that on May 28, 2002, he served three true copies of the Reply To Brief In Opposition To Petition For Writ Of Certiorari in the above-entitled matter on the respondent and by placing same in envelopes addressed as follows:

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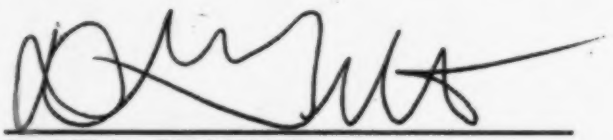
Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.



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